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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. ~~878~~ 20

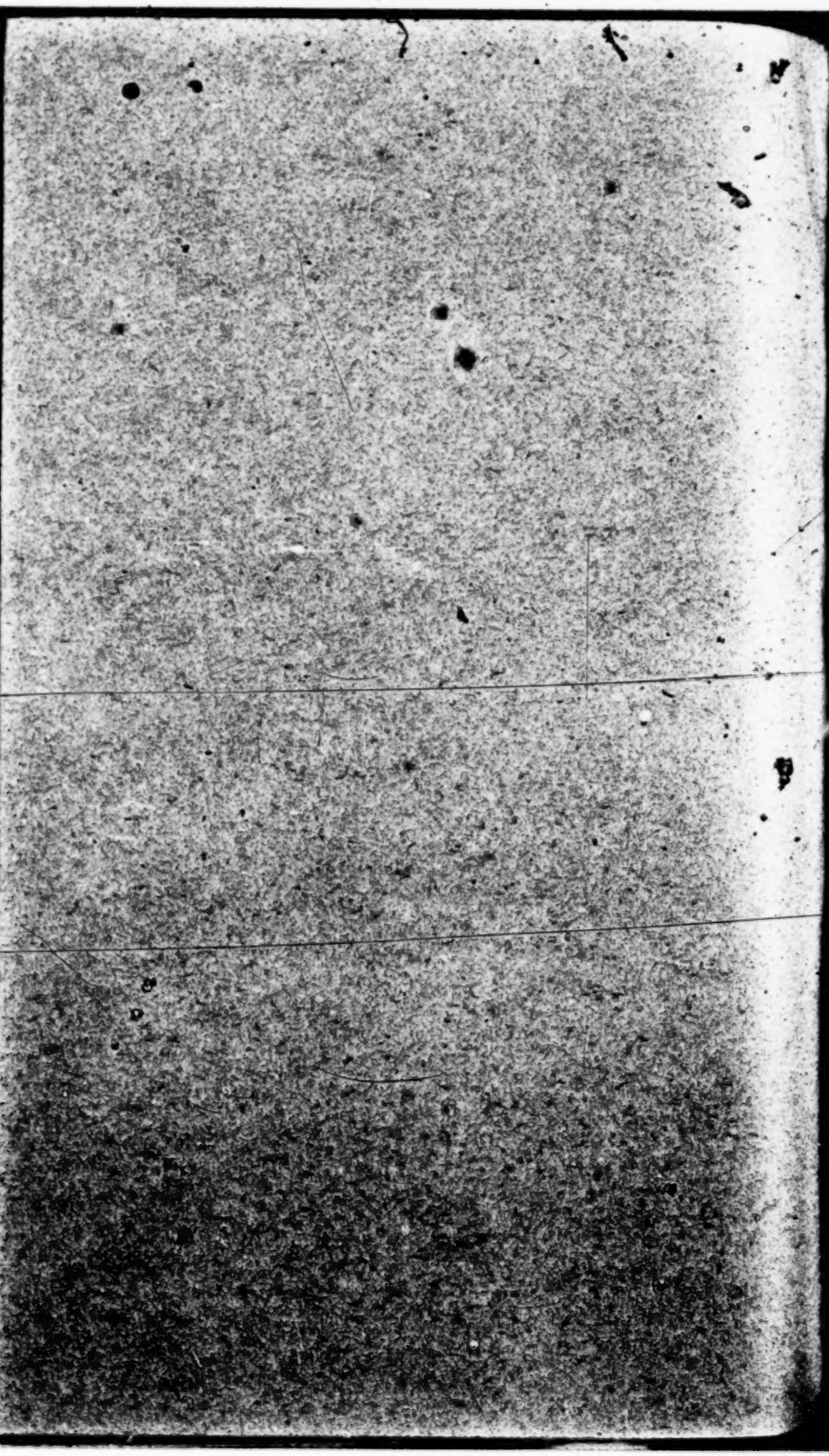
GREAT NORTHERN RAILWAY COMPANY,
APPELLANT,

vs.

STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED MARCH 30, 1936.



SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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[fol. 1]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 14908

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Plaintiff,

vs.

STATE OF WASHINGTON, Defendant

[File endorsement omitted.]

AMENDED COMPLAINT—Filed March 9, 1934

Comes now the plaintiff above named and files this its amended complaint herein:

For its first cause of action against the defendant, plaintiff alleges:

I

At all times herein mentioned plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota. It has filed with the Secretary of State of the State of Washington a certified copy of its charter and a certified copy of each and all of its certificates of increase of capital stock, and a certificate of its appointment of a Resident Agent in the State of Washington to accept service of process, and has paid all annual license fees due the State of Washington, and complied with all the laws of said state relating to foreign corporations.

II

At all times herein mentioned plaintiff owned and operated and now owns and operates a transportation system of railway lines and branches, having its eastern termini at St. Paul and Duluth, in the State of Minnesota, and Superior in the State of Wisconsin, and extending westerly from said termini through the States of Minnesota, North Dakota, Montana, Idaho, Washington, Oregon and [fol. 2] California, with its western termini at Seattle and Tacoma, in the State of Washington, and Portland in the

State of Oregon. Said line of railroad was constructed more than thirty-five years ago, and is now, and for more than thirty-five years last past has been, a public utility devoted to and used for the transportation, as a common carrier, of passengers and freight, both intrastate and interstate, and for the transportation of mail, express, freight and passengers for the government of the United States, and has been, and is now, an instrumentality of interstate commerce and of the commerce of the government of the United States.

III

Chapter 117, Session Laws of the State of Washington, 1911, known as the "Public Service Commission Law", created an administrative tribunal called the Public Service Commission, with the usual powers of regulation and supervision of public utilities, including common carriers. Chapter 7, Session Laws 1921, known as the "Administrative Code", (Sections 10759 to 10898, inclusive, R. C. S.), created an administrative tribunal, known as the Department of Public Works, under the general supervision of a Director of Public Works. The functions of the Public Service Commission with respect to common carriers were transferred by Section 25, Chapter 7, Session Laws 1921 (Section 10783 R. C. S.) to the Director of Public Works.

IV

The Public Service Commission Law (Section 10344 R. C. S.) defines the terms used in the act.

Common carriers are defined as follows:

"All railroads, railroad companies, street railroads, street railroad companies, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies and every corporation * * * operating * * * any such agency for public use in the conveyance of persons or property for hire within this state."

Public Service Companies are defined as follows:

"Every common carrier, gas company, electrical com-
[fol. 3] pany, water company, telephone company, telegraph company, wharfinger and warehouseman, as such terms are defined in this section."

V

The Public Service Commission Law as amended (Section 10416 R. C. S.) provides that "every public service company" shall make an annual report to the Commission, containing details of its corporate structure, capitalization, gross and net revenues, expenses, etc., said report to be filed at the office of the Department of Public Works in Olympia within three months after the close of the year for which the report is made. By Chapter 113, Session Laws 1921 (Section 10417 R. C. S.) the legislature amended the Public Service Commission Law to require every corporation "making and filing the annual statement required by Section 10416 R. C. S. to pay to the Director of Public Works a fee based on the gross operating revenues." For gross operating revenue between $5,000 and $10,000 the fee is $10.00, increasing gradually to a fee of $600 for revenue of five million dollars or over. By this act (Section 10418 R. C. S.) it is provided that all such sums collected by the Department of Public Works "shall within thirty days after their receipt be paid to the State Treasurer, and by him deposited in a fund to be known as the Public Service Revolving Fund." The same act, as later amended by Chapter 107, Session Laws 1923 (Section 10419 R. C. S., 1927 Supplement) prescribes a penalty of $25 for each day the fee remains unpaid, to be collected by the Department of Public Works in a civil action and deposited in the Public Service Revolving Fund of the State Treasury, and subjects the corporations "or the officers, agents or employes thereof" to prosecution for a misdemeanor.

VI

Chapter 107, Session Laws 1923 (Section 10417 R. C. S., 1927 Supplement), amended Chapter 113, Session Laws 1921 (Section 10417 R. C. S.) to require every corporation "regulated by or making and filing with the Department of [fol. 4] Public Works" the said annual statement, "except municipally owned or operated utilities", to pay an annual fee, increasing gradually from $5.00 for gross operating revenue of less than $5,000 to a fee of $1500 for revenue of six million dollars or over. The provisions for payment of the fees into the Revolving Fund and for penalties remained the same.

VII

Chapter 107, Session Laws 1929, again amended Chapter 113, Session Laws 1921, as amended by Chapter 107, Session Laws 1923, to require every "corporation engaged in business as a public utility and subject to regulation as to rates and charges by the Department of Public Works, except all transportation and steamboat companies holding certificates under Chapter 248 of the Laws of 1927," to file with the Department of Public Works, on or before the first day of April of each year, a sworn statement "showing its gross operating revenue for the preceding calendar year, and pay to the Department of Public Works a fee of 1/10 of 1% of such gross operating revenue." The provisions for payment of the fees into the Revolving Fund and for penalties again remained the same.

VIII

During the calendar year 1929 plaintiff's gross operating revenue for its entire system of railway, and from all other sources, including both interstate and intrastate business, and the transportation of mail, express, freight and passengers for the government of the United States, was the sum of $125,932,807.81. During said year plaintiff's gross operating revenue from traffic moving solely within the State of Washington, including transportation of mail, freight and passengers for the government of the United States, was $8,027,770.40. On March 31, 1930, in order to avoid the imposition of the penalties and criminal prosecu-
[fol. 5] tion as prescribed by said statutes, as alleged in paragraph V hereof, the plaintiff paid under protest to the Department of Public Works of the State of Washington the annual fee, amounting for the calendar year 1929 to $8027.77, imposed upon plaintiff by said Department under and by virtue of Chapter 107, Session Laws 1929.

IX

At the time plaintiff extended its line of railroad into the State of Washington, it complied and at all times since has complied with the laws of the state relating to foreign corporations doing business therein. Until 1897 no annual license fees were imposed by the State of Washington upon either domestic or foreign corporations doing business in

said state. By Chapter 70, Session Laws 1897, which remained in effect until 1907, an annual license fee of $10 was imposed upon every corporation having capital stock. Chapter 140, Session Laws 1907, which remained in effect until 1923, increased said annual license fee to $15. By Chapter 144, Session Laws 1923, every corporation having its articles of incorporation on file in the office of the Secretary of State, was required to pay an annual license fee in proportion to its authorized capital stock, increasing gradually from $15 for capital of $50,000 or less, to a fee of $150 for capital in excess of one million dollars, and up to and including two million dollars, and $1.00 for each one million dollars or fraction thereof of capital in excess of two million dollars. Said corporation license fee was again increased by Chapter 149 Laws Extraordinary Session 1925 (Section 3841 R. C. S. 1927 Supplement) by raising the fee on corporations having a capital stock above two million dollars from $1.00 to $10.00 for each one million dollars or fraction thereof, with a proviso that the total amount of such annual license fee should in no case exceed $3,000. Both by said Chapter 149, Laws Extraordinary Session 1925 and by Chapter 144, Session Laws 1923, it was provided "that the annual fee required to be paid [fol. 6] to the Department of Public Works by any public service company shall be deducted from the annual fee provided herein, and the excess only shall be collected under this act." On May 8, 1928, the Supreme Court of the State of Washington in the case of Great Northern Railway Company v. State of Washington, reported in 147 Wash. Reports, page 630, held Chapter 149, Laws Extraordinary 1925, unconstitutional and void as to Railway Companies doing both a local and an interstate business.

Thereupon, the legislature passed Chapter 227, Session Laws 1929, which provides in section 4 thereof, that "every corporation organized under the laws of this state, except the corporations for which existing law provides a different fee schedule, shall pay, on or before the first day of July of each and every year to the Secretary of State, for the use of the state, an annual fee of $15 for the first $50,000 or less of its authorized capital stock, and 1/40 of 1% additional on all amounts in excess of $50,000, and not exceeding one million dollars, and 1/100 of 1% additional on all amounts in excess of one million dollars, and not

exceeding four million dollars, and 1/200 of 1% additional on all amounts in excess of four million dollars, but in no case shall an annual license-fee exceed the sum of $1250," and in Section 5 thereof: "All foreign corporations doing intrastate business, or hereafter seeking to do intrastate business in this state, shall pay for the privilege of doing such intrastate business in this state, the same fees as are prescribed for domestic corporations for annual license fees in the preceding section, such fees to be computed upon the proportion of the capital stock represented or to be represented by its property and business in this state, to be ascertained by comparing the entire volume of business with the volume of intrastate business in this state."

It is also provided in Section 8 of Chapter 227, Session [fol. 7] Laws of 1929, "that the annual fee required to be paid to the Department of Public Works by any Public service company, shall be deducted from the annual license fee provided herein, and the excess only shall be collected."

X

By Section 3842 of Remington's Compiled Statutes of Washington it is provided that "no corporation shall be permitted to commence or maintain any suit, action or proceeding in any court of this state without alleging and proving that it has paid its annual license fee last due." By the same section it is provided that "failure upon the part of any corporation to pay its annual license fee for the period of one year from and after the date when such payment first became due, shall be prima facie evidence of the insolvency of such corporation, and the fact of such insolvency may be shown by the state or by any private person or corporation." By said section it is further provided that "it shall be the duty of the Secretary of State to strike from the records of its office the names of all corporations which have neglected for a period of two years to pay their annual license fees, and any corporation thereafter organized may take and shall have the exclusive right to use the corporate name of any corporation so stricken from the records."

By Section 3843, Remington's Compiled Statutes, as amended by Chapter 144, Section 5 of the Session Laws of 1923, and subsequent sections, it is provided that every

corporation whose name has been stricken from the records of the office of the Secretary of State for failure to pay its annual license fee for two years may be reinstated at any time within three years after its name has been stricken from the record by paying to the Secretary of State, for the use of the State, all license fees and penalties then due from it, and the additional sum of $10 for each and every year that its name has been stricken from the records, but [fol. 8] that, if, within the period named, such corporation shall not have made such application, the Secretary of State shall enter upon his records a notation that such corporation is dissolved, and that it shall thereafter be dissolved, and the trustees of such corporation shall hold the title to its property for the benefit of its stockholders and creditors, to be disposed of under appropriate court proceedings. It is also provided by said Section 3842 of Remington's Compiled Statutes that the State Board of Tax Commissioners may institute suits to enforce the payment of any license fee due from any corporation under the above mentioned laws.

If Chapter 107, Session Laws of 1929 and Chapter 107, Session Laws of 1923, should both be held unconstitutional and void as to the plaintiff herein, then the plaintiff will be required to pay to the Secretary of State the annual license fee imposed by said Chapter 227, Session Laws of 1929, or be liable to the infliction of the penalties, and to be deprived of the rights and privileges as provided by the aforesaid statutes.

XI

At all times herein mentioned plaintiff's authorized capital stock was, and is now, the sum of two hundred fifty million dollars. During the year 1929 the volume of plaintiff's intrastate business in the State of Washington was 6.375% of the volume of business done by plaintiff on its entire system. Using the formula provided in Section 5, Chapter 227, Session Laws 1929, plaintiff's annual license fee due the Secretary of State July 1, 1930, would be computed upon 6.375% of its authorized capital stock, which would make plaintiff's authorized capital stock allocated to the State of Washington, $15,937,500. Applying the rates named in said statute, plaintiff's annual license fee due July 1, 1930, amounted to the sum of $1149.38, as shown [fol. 9] by the following computation:

Capital Stock Allocated to Washington under Chapter 227, Session Laws 1929.		Amount of Fees
From 0 to $50,000	$50,000	$15.00
From 50,001 to 1,000,000	950,000	237.50
From 1,000,001 to 4,000,000	3,000,000	300.00
In Excess of 4,000,000	11,937,500	596.88
Total	$15,937,500	$1,149.38

Since said annual license fee, amounting to $1,149.38, payable July 1, 1930 to the Secretary of State, under Chapter 227, Session Laws 1929, was less than the annual fee paid to the Department of Public Works on March 31, 1930, under the provisions of Section 8, Chapter 227 Session Laws 1929 there was no fee due, and none was paid to the Secretary of State. If Chapter 107, Session Laws 1929, should be held unconstitutional and void as to the plaintiff herein, then there was due the Department of Public Works under Chapter 107, Session Laws 1923, an annual gross operating license fee of $1500, and since the annual license fee due July 1, 1930 to the Secretary of State under Chapter 227 Session Laws 1929, was less than said annual gross operating license fee due the Department of Public Works on March 31, 1930, under said Chapter 107 Session Laws 1923, under the provisions of Section 8 of said Chapter 227 Session Laws 1929, there was no fee due the Secretary of State. If Chapter 107 Session Laws 1929 and Chapter 107 Session Laws 1923 should both be held unconstitutional and void as to the plaintiff herein, then there was due the Secretary of State under Chapter 227 Session Laws 1929, the annual license fee payable to the Secretary of State July 1, 1930, computed as hereinabove set forth, and amounting to the sum of $1149.38, less the fee of $600 payable to the Department of Public Works under Chapter 113 Session Laws 1921, unless said Chapter 227 Session Laws 1929 [fol. 10] should also be held unconstitutional and void. In the event the last mentioned statute should also be held unconstitutional and void as to the plaintiff herein, then there was due the Department of Public Works under Chapter 113 Session Laws 1921, an annual gross operating license fee of $600, unless said Chapter 113 Session Laws 1921 should also be held unconstitutional and void.

XII

For the privilege of doing an intrastate business in the State of Washington, Chapter 107 Session Laws 1929, purports to levy a tax computed upon a percentage of, and Chapters 107 Session Laws 1923 and 113 Session Laws 1921, purport to levy a graduated tax computed solely upon, the annual gross operating revenue of the plaintiff from all sources. Under the provisions of all of said statutes the tax is computed upon revenue derived from both interstate and intrastate commerce, from property located outside the State of Washington, and from the transportation of mail, express, freight and passengers for the government of the United States. The Department of Public Works has interpreted Chapter 107 Session Laws 1929, as excluding from the gross operating revenues upon which the tax is imposed, all revenues derived from interstate commerce and from property located outside of the state of Washington, and has computed the tax upon revenue derived from business done solely within the State of Washington, but including therein revenue derived from transportation within the State of Washington of mail, express, freight and passengers for the United States Government.

Chapter 227 Session Laws 1929, purports to levy a tax for the privilege of doing an intrastate business in the State of Washington, computed upon the proportion of the capital stock represented or to be represented by its property and business in this state, to be ascertained by com- [fol. 11] paring the entire volume of business done by plaintiff during any calendar year, including revenues derived from both interstate and intrastate commerce, from property located outside the State of Washington and from the transportation of mail, express, freight and passengers for the United States Government, with the volume of intrastate business in this state, including the transportation of mail, express, freight and passengers within the State of Washington for the government of the United States.

XIII

Plaintiff built and equipped its line of railroad in the State of Washington more than thirty-five years ago and before said Chapter 113 Session Laws of 1921, Chapter 107

Session Laws of 1923 and Chapters 107 and 227 Session Laws of 1929, or any of them, were enacted, and had expended more than one hundred million dollars therefor. It then commenced, and ever since has carried on both interstate and intrastate commerce in said state. In 1905, long after plaintiff had constructed and equipped its line of railroad in this state there was enacted Chapter 81 Session Laws of 1905, entitled, "An Act to Establish a Railroad Commission for the State of Washington", etc., followed in 1911 by the enactment of the Public Service Commission Law, mentioned in Paragraph III hereof. By the Constitution of the State of Washington and said statutes and acts amendatory of said statutes and supplemental thereto, and by the Acts of Congress regulating interstate commerce, particularly Section 1 (18)-(21), Section 13, Section 15a and Section 19a thereof, there is imposed upon plaintiff an obligation to devote its property to the service of the people of said state in intrastate transportation, from which it cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce. Plaintiff's investment, prior to the enactment of said laws, was made to provide adequate facilities for the handling of both interstate and intrastate commerce, and a [fol. 12] substantial part thereof was made by order of the Railroad Commission of Washington, and its successors, the Public Service Commission and Department of Public Works for the purpose of equipping its property to comply with said Public Service Commission law. Plaintiff's railroad system comprises approximately 10,541 miles of track, of which approximately 1450 miles are in the State of Washington. It is taxed in the State of Washington pursuant to Chapter 130 Laws Special Session of 1925, at its fair market value, considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. Said acts, including said Chapter 107 Session Laws of 1929, do not levy a property tax in lieu of all other taxation, for the reason that plaintiff's property is fully taxed on an ad valorem basis, as aforesaid. Plaintiff's gross operating revenue for business done in the State of Washington for the year 1929 was the sum of $17,549,476.00, of which $8,027,770.40 was from intrastate and $9,521,706.00 from interstate commerce. Both classes of business were and are

carried by plaintiff in the same trains, operated by the same employes, over the same lines of railroad, and are inextricably commingled, so that it is not and was not possible, practically and economically, or at all, to carry interstate commerce separately from intrastate commerce in different trains, or by means of different instrumentalities or employes, or on different lines. It was not and is not, as a practical matter, or at all, possible for plaintiff to withdraw from its intrastate commerce and continue its interstate commerce. The taxes imposed on plaintiff by said Chapter 113 Session Laws 1921, Chapter 107 Session Laws 1923 and Chapters 107 and 227 Session Laws of 1929, and each of them, whether viewed as taxes or fees for the privilege of doing intrastate business in the State of Washington or otherwise, are in truth and in fact fees or taxes exacted for the privilege of doing interstate business in this state as a [fol. 13] common carrier by railroad, and for the privilege of transporting mail, express, freight and passengers for the government of the United States, and are fees or taxes which plaintiff cannot avoid by withdrawing its property from use in intrastate commerce, either under the State Constitution, said Public Service Commission Law of the State of Washington, under the acts of Congress regulating interstate commerce, or as a practical matter, or at all, and said fees so exacted by said laws, and each of them, constitute a burden upon interstate commerce, and upon an agency devoted thereto, and said laws, and each of them are in violation of Section 8, Article 1 of the Constitution of the United States, of the acts of Congress regulating interstate commerce, and of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and are null and void.

XIV

Plaintiff's authorized capital of $250,000,000 is invested in and represents the property and railway lines of the plaintiff located in the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana, Idaho, Oregon and California, and in the Dominion of Canada, as well as in the State of Washington, and other property and securities in other companies, not included in its said system of transportation, substantially all of which property and securities in other companies are located outside the

State of Washington, and have a value of over Two Hundred Million Dollars. Plaintiff's line of railroad, of which plaintiff's railroad in the State of Washington is a component part, has a value of several hundred million dollars. In the year 1929 the full true cash value of plaintiff's operating property in the State of Washington for taxation purposes, as fixed by the Tax Commission of said state as provided by statute, was the sum of $81,000,000, and the equalized value as determined by the State Equalization Committee in accordance with the statutes in such cases made and provided, upon which value general taxes were levied and assessed against the plaintiff's property within the State of Washington for the year 1929, was the sum [fol. 14] of $35,356,975.00. If the statutes of the State of Washington and of the United States permitted the plaintiff to withdraw from intrastate commerce in said state while still continuing its functions of a common carrier of interstate commerce therein, its very large property investment in the State of Washington, and the present or future public convenience and necessity would not permit plaintiff, as a practical matter, to discontinue its said intrastate business. If the Constitution and statutes of the State of Washington permitted the plaintiff to withdraw from intrastate commerce in said state, it could not withdraw therefrom under the statutes of the United States.

XV

Under the Public Service Commission Law (Chapter 117, Session Laws 1911, Sections 10339 to 10490, inclusive, R. C. S. as amended) and under other laws of this state, the Department of Public Works exercises jurisdiction over and supervision of many classes of public utilities, including common carriers by rail, railroads operated by electricity, street railways, gas, electrical and water companies, telegraph and telephone companies, wharfingers and warehousemen, carriers by water, and many other activities wholly disconnected from and unrelated to its duties of inspection and supervision of common carriers by railroad, and is charged with the performance of a variety of duties, other than those pertaining to inspection and supervision of common carriers by railroad under the police power of the state. If Chapter 113, Session Laws of 1921, Chapter 107, Session Laws of 1923, and Chapter 107, Session Laws

of 1929, or any of them, be construed as imposing a fee for supervision and inspection, then said statutes, and each of them, do not restrict the fee to be held by plaintiff or other common carriers by rail, to the cost of legitimate regulation or supervision, nor is such fee based upon the proper cost or expense thereof, but the same is a flat fee of a percentage of gross revenue levied upon carriers by rail, and other corporations, for the purpose of paying the expense of supervising and inspecting a variety of inde- [fol. 15] pendent and unrelated corporations, as above alleged, and for the purpose of paying the expense of performance of a variety of unrelated duties, including the expense of performing duties and discharging functions which properly pertain to inspection, supervision and regulation, and many expenses of performing duties and discharging functions, such as business and policing expenses, the expense whereof cannot be imposed upon common carriers by rail, including plaintiff, as legitimate expenses of supervising, inspecting and regulating such common carriers by rail. The fee or tax provided by said Chapter 107, Session Laws of 1929, and the other statutes hereinbefore mentioned, is grossly in excess of the reasonable cost of inspection and supervision of common carriers by rail. Plaintiff is informed and believes, and alleges that there has been accumulated from the fees paid under said acts, up to and including the first of January, 1933, the sum of more than $250,000 in excess of the amount expended by the Department of Public Works in the discharge of its manifold duties and functions under the laws of this state. Said fee or tax is not a reasonable or legitimate inspection or supervision fee or tax, but said statutes, and each of them, are in truth and in fact, revenue measures. The taxes imposed by and under said statutes are made payable into the public service revolving fund, which fund is a general state fund, subject to withdrawal for various and sundry expenses of the state, and not solely devoted by law to the expense incurred by the Department of Public Works in the performance of its duties of inspection or supervision of common carriers by rail, or other corporations or businesses subject to its jurisdiction. Said fee or tax, if construed to be a supervision or inspection fee or tax, is, and constitutes a burden on, and regulation of, interstate commerce in violation of Section 8, Article 1 of the Constitu-

tion of the United States, is capricious, arbitrary, excessive and unreasonable, and is discriminatory and unequal, denies to plaintiff the equal protection of the laws, and deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitu-
[fol. 16] tion of the United States and Article I, Sections 3 and 12 and Article VII, Sections 1, 2 and 3 of the State Constitution.

XVI

Chapter 113, Session Laws 1921, Chapter 107, Session Laws 1923, Chapters 107 and 227, Session Laws 1929, and each and all of said acts, are unconstitutional, and the taxes imposed thereunder are unlawful, null and void for the following reasons:

(a) If said acts are interpreted as imposing a fee for regulation and inspection purposes, the fees imposed are unreasonable and disproportionate to the services rendered, and said statutes were not enacted in good faith for regulation and inspection purposes, but were in truth and in fact enacted, at least in part, for revenue purposes, but, whether said acts impose a tax for revenue purposes or for regulation and inspection purposes, said acts are in violation of Section 8, Article I of the Constitution of the United States, in that they impose a tax on plaintiff's property devoted to commerce among the states and with foreign nations and a tax on such commerce.

(b) If said acts are construed as imposing a tax to defray the expense of regulating and inspecting the public utilities named therein, said tax is a direct burden upon and a regulation of interstate commerce, in violation of Section 8, Article I of the Constitution of the United States, denies plaintiff and other similar corporations equal protection of the laws and deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 3 and 12 and Article VII, Sections 1, 2 and 3 of the State Constitution, in that said tax is imposed by said statutes, at least in part, for the purpose of regulating and inspecting other public utilities in no way related to or connected with the business of operating a common carrier railway, and for the purpose of defraying the expense

of performing functions and furnishing services entirely disconnected from the regulation of railroads, and for the [fol. 17] further purpose of regulating and supervising interstate services, facilities and rates of railroads engaged in interstate commerce, which tax plaintiff and other similar corporations cannot avoid by withdrawing from intrastate commerce in this state.

(c) If said acts are interpreted as imposing a fee for regulation and inspection purposes, then, while plaintiff and all other residents of this state and all other corporations doing business therein, are taxed upon their property within the state on an ad valorem basis, plaintiff and other similar corporations are also taxed under said statutes to defray the expense of regulating and inspecting disconnected and unrelated public utilities, although said statutes do not impose said tax upon all residents of the state and upon all corporations doing business therein, and thus said statutes deny to plaintiff and other similar corporations the equal protection of the laws, and deprive them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 3 and 12 and Article VII, Sections 1, 2 and 3 of the State Constitution.

(d) Plaintiff is informed and believes, and therefore alleges that a large portion of the funds collected under said acts has been used to defray the expenses of the Department of Public Works in proceedings before the Interstate Commerce Commission, in connection with interstate rates, services and facilities. In many of such proceedings the parties directly interested and benefited by the services performed by said Department before the Interstate Commerce Commission are shippers and corporations engaged in business in this state, which are not taxed under said statutes, or at all, for said purposes. To impose said tax upon plaintiff and similar corporations and expend said funds for said purposes amounts to a regulation of interstate commerce, in violation of Section 8, Article I of the Constitution of the United States, and denies plain-[fol. 18] tiff and other similar corporations the equal protection of the laws, and deprives them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and

Article I, Sections 3 and 12 and Article VII, Sections 1, 2 and 3 of the State Constitution.

(e) Plaintiff is informed and believes, and therefore alleges that the funds collected and expended under said acts, and the cost of regulation and inspection of railroads, have been so intermingled with the cost of regulating and inspecting disconnected and unrelated public utilities, and with the cost of performing services entirely outside of the sphere of the state's acknowledged authority, such as the cost of proceedings before the Interstate Commerce Commission with respect to interstate rates, services and facilities, and that the fees collected have exceeded the cost of regulation and inspection of plaintiff and other similar railroad corporations by such a large sum that the tax imposed by said statutes is unreasonable and disproportionate to the services rendered, and so obstructs the freedom of interstate commerce as to amount to a regulation thereof, in violation of Section 8, Article I of the Constitution of the United States, and denies plaintiff the equal protection of the laws and deprives it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 3 and 12, and Article VII, Sections 1, 2 and 3 of the State Constitution.

(f) Said acts operate to tax the property of the plaintiff in other states having no taxable situs in Washington, and thus deprive plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(g) Said acts tax domestic corporations in proportion to their capital and property within the State of Washington alone, and therefore discriminate against the plaintiff and other similar foreign corporations by taxing them on all [fol. 19] of their property, wherever located, and thus deny to them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

(h) Said acts levy a tax upon revenues derived from the transportation of the mails, passengers, freight and express for the government of the United States, and thereby impose a burden upon and interfere with the exercise of

governmental powers of the Federal Government, which the constitution of the United States contemplates shall be supreme and independent of state supervision or regulation.

XVII

The exaction from the plaintiff by the defendant of said tax of $8027.77, or of any tax or license fee imposed by said statutes or any of them, was and is contrary to the Constitution of the United States and the Fourteenth Amendment thereto, as hereinabove alleged.

For a second cause of action against the defendant, plaintiff alleges:

I

Plaintiff hereby adopts and realleges Paragraphs I to VII, inclusive, of its first cause of action herein, as Paragraphs I to VII, inclusive, of this, its second cause of action.

VIII

During the calendar year 1930 plaintiff's gross operating revenue for its entire system of railway, and from all other sources, including both interstate and intrastate business and the transportation of mail, express, freight and passengers for the government of the United States, was $104,996,076.26. During said year plaintiff's gross operating revenue from traffic moving solely within the State of Washington, including transportation of mail, freight and passengers for the government of the United States, [fol. 20] was $7,267,082.52. On March 26, 1931, in order to avoid the imposition of the penalties and criminal prosecution, as prescribed by said statutes as alleged in Paragraph V hereof, the plaintiff paid under protest to the Department of Public Works of the State of Washington, the annual fee, amounting for the calendar year 1930, to $7,267.08, imposed upon plaintiff by said Department under and by virtue of Chapter 107, Session Laws of 1929.

IX

Plaintiff hereby adopts and realleges Paragraph IX of its first cause of action as Paragraph IX of this, its second cause of action.

X

Plaintiff hereby adopts and realleges Paragraph X of its first cause of action herein as Paragraph X of this, its second cause of action.

XI

At all times herein mentioned plaintiff's authorized capital stock was and is now the sum of $250,000,000. During the year 1930 the volume of plaintiff's intrastate business in the State of Washington was 6.921% of the volume of business done by plaintiff on its entire system. Using the formula provided in Section 5, Chapter 227, Session Laws of 1929, plaintiff's annual license fee due the Secretary of State July 1, 1931, would be computed upon 6.921% of its capital stock allocated to the State of Washington, which would make plaintiff's authorized capital stock allocated to the State of Washington $17,302,500.00. Applying the rates named in said statute, plaintiff's annual license fee due July 1, 1931, amounted to the sum of $1217.63, as shown by the following computation:

[fol. 21]

Capital Stock Allocated to Washington under Chapter 227, Session Laws 1929		Amount of Fees
From 0 to $50,000	$50,000	$15.00
From 50,001 to 1,000,000	950,000	237.50
From 1,000,001 to 4,000,000	3,000,000	300.00
In Excess of 4,000,000	13,302,500	665.13
Total	$17,302,500	$1,217.63

Since said annual license fee, amounting to $1,217.63, payable July 1, 1931 to the Secretary of State, under Chapter 227, Session Laws 1929, was less than the annual fee paid to the Department of Public Works on March 26, 1931, under the provisions of Section 8, Chapter 227, Session Laws 1929, there was no fee due, and none was paid to the Secretary of State. If Chapter 107, Session Laws 1929, should be held unconstitutional and void as to the plaintiff herein, then there was due the Department of Public Works under Chapter 107, Session Laws 1923, an annual gross operating license fee of $1,500, and since the annual license fee due July 1, 1931 to the Secretary of State under Chap-

ter 227, Session Laws 1929, was less than said annual gross operating license fee due the Department of Public Works on March 26, 1931, under said Chapter 107, Session Laws 1923, under the provisions of Section 8 of said Chapter 227, Session Laws 1929 there was no fee due the Secretary of State. If Chapter 107, Session Laws 1929 and Chapter 107, Session Laws 1923, should both be held unconstitutional and void as to the plaintiff herein, then there was due the Secretary of State under Chapter 227, Session Laws 1929, the annual license fee payable to the Secretary of State July 1, 1931, computed as hereinabove set forth, and amounting to the sum of $1,217.63, less the fee of $600 payable to the Department of Public Works under Chapter 113, Session Laws 1921, unless said Chapter 227, Session Laws 1929, should also be held unconstitutional and void. In the [fol. 22] event the last mentioned statute should also be held unconstitutional and void as to the plaintiff herein, then there was due the Department of Public Works under Chapter 113, Session Laws 1921, an annual gross license fee of $600, unless said Chapter 113, Session Laws 1921, should also be held unconstitutional and void.

XII

Plaintiff hereby adopts and realleges paragraph XII of its first cause of action herein as paragraph XII of this, its second cause of action.

XIII

Plaintiff built and equipped its line of railroad in the State of Washington more than thirty-five years ago and before said Chapter 113, Session Laws of 1921, Chapter 107 Session Laws of 1923 and Chapters 107 and 227 Session Laws of 1929, or any of them, were enacted, and has expended more than one hundred million dollars therefor. It then commenced, and ever since has carried on both interstate and intrastate commerce in said state. In 1905, long after plaintiff had constructed and equipped its line of railroad in this state there was enacted Chapter 81 Session Laws of 1905, entitled, "An Act to Establish a Railroad Commission for the State of Washington", etc., followed in 1911 by the enactment of the Public Service Commission Law, mentioned in Paragraph III hereof. By the Consti-

tution of the State of Washington and said statutes and acts amendatory of said statutes and supplemental thereto, and by the Acts of Congress regulating interstate commerce, particularly Section 1 (18)-(21), Section 13, Section 15a and Section 19a thereof, there is imposed upon plaintiff an obligation to devote its property to the service of the people of said state in intrastate transportation, from which it cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce. Plaintiff's investment, prior to the enactment of said laws, was made to provide adequate facilities for the handling of [fol. 23] both interstate and intrastate commerce, and a substantial part thereof was made by order of the Railroad Commission of Washington, and its successors, the Public Service Commission and Department of Public Works for the purpose of equipping its property to comply with said Public Service Commission law. Plaintiff's railroad system comprises approximately 10,541 miles of track, of which approximately 1,450 miles are in the State of Washington. It is taxed in the State of Washington pursuant to Chapter 130 Laws Special Session of 1925, at its fair market value, considered as a going concern, including all of its property, real, personal and mixed and all of its rights and franchises of every kind and nature whatsoever. Said acts, including said Chapter 107 Session Laws of 1929, do not levy a property tax in lieu of all other taxation, for the reason that plaintiff's property is fully taxed on an ad valorem basis, as aforesaid. Plaintiff's gross operating revenue for business done in the State of Washington for the year 1930 was the sum of $15,372,894.52, of which $7,267,082.52 was from intrastate and $8,105,812.00 from interstate commerce. Both classes of business were and are carried by plaintiff in the same trains, operated by the same employes, over the same lines of railroad, and are inextricably commingled, so that it is not and was not possible, practically and economically, or at all, to carry interstate commerce separately from intrastate commerce in different trains, or by means of different instrumentalities or employes, or on different lines. It was not and is not, as a practical matter, or at all, possible for plaintiff to withdraw from its intrastate commerce and continue its interstate commerce.

The taxes imposed on plaintiff by said Chapter 113 Session Laws 1921, Chapter 107 Session Laws 1923 and Chapters 107 and 227 Session Laws of 1929, and each of them, whether viewed as taxes or fees for the privilege of doing intrastate business in the State of Washington or otherwise, are in truth and in fact fees or taxes exacted for the privilege of doing interstate business in this state as a common carrier by railroad, and for the privilege of transport- [fol. 24] ing mail, express, freight and passengers for the government of the United States, and are fees or taxes which plaintiff cannot avoid by withdrawing its property from use in intrastate commerce, either under the State Constitution, said Public Service Commission Law of the State of Washington, under the acts of Congress regulating interstate commerce, or as a practical matter, or at all, and said fees so exacted by said laws, and each of them constitute a burden upon interstate commerce, and upon an agency devoted thereto, and said laws, and each of them are in violation of Section 8, Article 1 of the Constitution of the United States, of the acts of Congress regulating interstate commerce, and of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and are null and void.

XIV

Plaintiff's authorized capital of $250,000,000 is invested in and represents the property and railway lines of the plaintiff located in the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana, Idaho, Oregon and California, and in the Dominion of Canada, as well as in the State of Washington, and other property and securities in other companies, not included in its said system of transportation, substantially all of which property and securities in other companies are located outside the State of Washington, and have a value of over Two Hundred Million Dollars. Plaintiff's line of railroad, of which plaintiff's railroad in the State of Washington is a component part, has a value of several hundred million dollars. In the year 1930 the full true cash value of plaintiff's operating property in the State of Washington for taxation purposes, as fixed by the Tax Commission of said state as provided by statute was the sum of $81,000,000, and the equalized value

as determined by the State Equalization Committee in accordance with the statutes in such cases made and provided, [fol. 25] upon which value general taxes were levied and assessed against the plaintiff's property within the State of Washington for the year 1930, was the sum of $35,381,092.00. If the statutes of the State of Washington and of the United States permitted the plaintiff to withdraw from intrastate commerce in said state while still continuing its functions of a common carrier of interstate commerce therein, its very large property investment in the State of Washington, and the present or future public convenience and necessity would not permit plaintiff, as a practical matter, to discontinue its said intrastate business. If the Constitution and statutes of the State of Washington permitted the plaintiff to withdraw from intrastate commerce in said state, it could not withdraw therefrom under the statutes of the United States.

XV

Plaintiff hereby adopts and realleges Paragraph XV of its first cause of action herein as paragraph XV of this, its second cause of action.

XVI

Plaintiff hereby adopts and realleges Paragraph XVI of its first cause of action herein, as paragraph XVI of this, its second cause of action.

XVII

The exaction from the plaintiff by the defendant of said tax of $7,267.08, or of any tax or license fee imposed by said statutes or any of them, was and is contrary to the Constitution of the United States and the Fourteenth Amendment thereto, as hereinabove alleged.

For a third cause of action against the defendant, plaintiff alleges:

I

Plaintiff hereby adopts and realleges Paragraphs I to VII, inclusive, of its first cause of action herein, as Paragraphs I to VII, inclusive, of this, its third cause of action.

VIII

During the calendar year 1931 paintiff's gross operating revenue for its entire system of railway, and from all other [fol. 26] sources, including both interstate and intrastate business and the transportation of mail, express, freight and passengers for the government of the United States, was the sum of $77,087,454.70. During said year plaintiff's gross operating revenue from traffic moving solely within the State of Washington, including transportation of mail, freight and passengers for the government of the United States was $5,528,981.62. On March 29, 1932, in order to avoid the imposition of the penalties and criminal prosecution, as prescribed by said statutes, as alleged in Paragraph V hereof, the plaintiff paid under protest to the Department of Public Works of the State of Washington the annual fee, amounting for the calendar year 1931, to $5,528.98, imposed upon plaintiff by said Department under and by virtue of Chapter 107 Session Laws 1929.

IX

Plaintiff hereby adopts and realleges Paragraph IX of its first cause of action herein, as paragraph IX of this, its third cause of action.

X

Plaintiff hereby adopts and realleges Paragraph X of its first cause of action herein, as paragraph X of this, its third cause of action.

XI

At all times herein mentioned plaintiff's authorized capital stock was, and is now, the sum of $250,000,000. During the year 1931 the volume of plaintiff's intrastate business in the State of Washington was 7.172% of the volume of business done by plaintiff on its entire system. Using the formula provided in Section 5, Chapter 227 Session Laws of 1929, plaintiff's annual license fee due the Secretary of State July 1, 1932 would be computed upon 7.172% of its authorized capital stock, which would make plaintiff's authorized capital stock allocated to the State of Wasington, $17,930,000.00. Applying the rates named in said statute,

plaintiff's annual license fee due July 1, 1932, amounted to the sum of $1249.00, as shown by the following computation:

[fol. 27]

Capital Stock Allocated to Washington under Chapter 227, Session Laws 1929		Amount of Fees
From 0 to $50,000	$50,000	$15.00
From 50,001 to 1,000,000	950,000	237.50
From 1,000,001 to 4,000,000	3,000,000	300.00
In Excess of 4,000,000	13,930,000	696.50
Total	$17,930,000	$1249.00

Since said annual license fee, amounting to $1249.00, payable July 1, 1832 to the Secretary of State, under Chapter 227, Session Laws 1929, was less than the annual fee paid to the Department of Public Works on March 29, 1932, under the provisions of Section 8, Chapter 227, Session Laws 1929, there was no fee due, and none was paid to the Secretary of State. If Chapter 107, Session Laws of 1929, should be held unconstitutional and void as to the plaintiff herein, then there was due the Department of Public Works under Chapter 107, Session Laws 1923, an annual gross operating license fee of $1500, and since the annual license fee due July 1, 1932, to the Secretary of State under Chapter 227, Session Laws 1929, was less than said annual gross operating license fee due the Department of Public Works on March 29, 1932, under said Chapter 107, Session Laws 1923, under the provisions of Section 8 of said Chapter 227, Session Laws 1929 there was no fee due the Secretary of State. If Chapter 107 Session Laws 1929 and Chapter 107, Session Laws 1923, should both be held unconstitutional and void as to the plaintiff herein, then there was due the Secretary of State under Chapter 227, Session Laws 1929, the annual license fee payable to the Secretary of State July 1, 1932, computed as hereinabove set forth, and amounting to the sum of $1249.00, less the fee of $600 payable to the Department of Public Works under Chapter 113, Session Laws 1921, unless said Chapter 227, Session Laws 1929, should also be held unconstitutional and void. In the event the last mentioned statute should also be held unconstitutional and [fol. 28] void as to the plaintiff herein, then there was due the Department of Public Works under Chapter 113, Ses-

sion Laws 1921, an annual gross license fee of $600, unless said Chapter 113, Session Laws 1921, should also be held unconstitutional and void.

XII

Plaintiff hereby adopts and realleges paragraph XII of its first cause of action herein, as paragraph XII of this, its third cause of action.

XIII

Plaintiff built and equipped its line of railroad in the State of Washington more than thirty-five years ago and before said Chapter 113 Session Laws of 1921, Chapter 107 Session Laws of 1923 and Chapters 107 and 227 Session Laws of 1929, or any of them, were enacted, and has expended more than one hundred million dollars therefor. It then commenced, and ever since has carried on both interstate and intrastate commerce in said state. In 1905, long after plaintiff had constructed and equipped its line of railroad in this state there was enacted Chapter 81 Session Laws of 1905, entitled, "An Act to Establish a Railroad Commission for the State of Washington", etc., followed in 1911 by the enactment of the Public Service Commission Law, mentioned in Paragraph III hereof. By the Constitution of the State of Washington and said statutes and acts amendatory of said statutes and supplemental thereto, and by the Acts of Congress regulating interstate commerce, particularly Section 1 (18)-(21), Section 13, Section 15a and Section 19a thereof, there is imposed upon plaintiff an obligation to devote its property to the service of the people of said state in intrastate transportation, from which it cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce. Plaintiff's investment, prior to the enactment of said laws, was made to provide adequate facilities for the handling of both interstate and intrastate commerce, and a substantial part thereof was made by order of the Railroad Commission of [fol. 29] Washington, and its successors, the Public Service Commission and Department of Public Works for the purpose of equipping its property to comply with said Public Service Commission law. Plaintiff's railroad system comprises approximately 10,541 miles, of which approximately

1450 miles are in the State of Washington. It is taxed in the State of Washington pursuant to Chapter 130 Laws Special Session of 1925, at its fair market value, considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. Said acts, including said Chapter 107 Session Laws of 1929, do not levy a property tax in lieu of all other taxation, for the reason that plaintiff's property is fully taxed on an ad valorem basis, as aforesaid. Plaintiff's gross operating revenue for business done in the State of Washington for the year 1931 was the sum of $11,778,584.62, of which $5,528,981.62 was from intrastate commerce and $6,249,603.00 from interstate commerce. Both classes of business were and are carried by plaintiff in the same trains, operated by the same employes, over the same lines of railroad, and are inextricably commingled, so that it is not and was not possible, practically and economically, or at all, to carry interstate commerce separately from intrastate commerce in different trains, or by means of different instrumentalities or employes, or on different lines. It was not and is not, as a practical matter, or at all, possible for plaintiff to withdraw from its intrastate commerce and continue its interstate commerce. The taxes imposed on plaintiff by said Chapter 113, Session Laws 1921, Chapter 107 Session Laws 1923 and Chapters 107 and 227 Session Laws of 1929, and each of them, whether viewed as taxes or fees for the privilege of doing intrastate business in the State of Washington or otherwise, are in truth and in fact fees or taxes exacted for the privilege of doing interstate business in this state as a common carrier by railroad, and for the privilege of transporting [fol. 30] mail, express, freight and passengers for the government of the United States, and are fees or taxes which plaintiff cannot avoid by withdrawing its property from use in intrastate commerce, either under the State Constitution, said Public Service Commission law of the State of Washington, under the acts of Congress regulating interstate commerce, or as a practical matter, or at all, and said fees so exacted by said laws, and each of them, constitute a burden upon interstate commerce, and upon an agency devoted thereto, and said laws, and each of them are in violation of Section 8, Article I of the Constitution of the United States, of the acts of Congress regulating interstate commerce, and

of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and are null and void.

XIV

Plaintiff's authorized capital of $250,000,000 is invested in and represents the property and railway lines of the plaintiff located in the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana, Idaho, Oregon and California, and in the Dominion of Canada, as well as in the State of Washington, and other property and securities in other companies, not included in its said system of transportation, substantially all of which property and securities in other companies are located outside the State of Washington, and have a value of over Two Hundred Million Dollars. Plaintiff's line of railroad, of which plaintiff's railroad in the State of Washington is a component part, has a value of several hundred million dollars. In the year 1931 the full true cash value of plaintiff's operating property in the State of Washington for taxation purposes, as fixed by the Tax Commission of said state as provided by statute, was the sum of $81,000,000.00 and the equalized value as determined by the State Equalization Committee in accordance with the statutes in such cases made and provided, upon which value general taxes were levied and assessed against the plaintiff's property within the State of Washington for the year 1931, was the sum of $35,384,885.00. If the statutes of the State of Washington [fol. 31] and of the United States permitted the plaintiff to withdraw from intrastate commerce in said state while still continuing its functions of a common carrier of interstate commerce therein, its very large property investment in the State of Washington, and the present or future public convenience and necessity would not permit plaintiff, as a practical matter, to discontinue its said intrastate business. If the Constitution and statutes of the State of Washington permitted the plaintiff to withdraw from intrastate commerce in said state, it could not withdraw therefrom under the statutes of the United States.

XV

Plaintiff hereby adopts and realleges Paragraph XV of its first cause of action herein, as paragraph XV of this, its third cause of action.

XVI

Plaintiff hereby adopts and realleges Paragraph XVI of its first cause of action herein, as paragraph XVI of this, its third cause of action.

XVII

The exaction from the plaintiff by the defendant of said tax of $5,528.98, or of any tax or license fee imposed by said statutes or any of them, was and is contrary to the Constitution of the United States and the Fourteenth Amendment thereto, as hereinabove alleged.

For a fourth cause of action against the defendant, plaintiff alleges:

I

Plaintiff hereby adopts and realleges Paragraphs I to VII, inclusive, of its first cause of action herein, as Paragraphs I to VII, inclusive, of this, its fourth cause of action.

VIII

During the calendar year 1932 plaintiff's gross operating revenue for its entire system of railway, and from all other sources, including both interstate and intrastate business and the transportation of mail, express, freight and passengers for the government of the United States, was the sum [fol. 32] of $55,549,246.37. During said year plaintiff's gross operating revenue from traffic moving solely within the State of Washington, including transportation of mail, freight and passengers for the government of the United States was $3,338,973.43. On March 24th, 1933, in order to avoid the imposition of the penalties and criminal prosecution, as prescribed by said statutes, as alleged in Paragraph V hereof, the plaintiff paid under protest to the Department of Public Works of the State of Washington, the annual fee, amounting for the calendar year 1932, to $3,338.97, imposed upon plaintiff by said Department under and by virtue of Chapter 107 Session Laws 1929.

IX

Plaintiff hereby adopts and realleges Paragraph IX of its first cause of action herein, as paragraph IX of this, its fourth cause of action.

X

Plaintiff hereby adopts and realleges Paragraph X of its first cause of action herein, as paragraph X of this, its fourth cause of action.

XI

At all times herein mentioned plaintiff's authorized capital stock was, and is now, the sum of $250,000,000. During the year 1932 the volume of plaintiff's intrastate business in the State of Washington was 6.011% of the volume of business done by plaintiff on its entire system. Using the formula provided in Section 5, Chapter 227 Session Laws of 1929, plaintiff's annual license fee due the Secretary of State July 1, 1933 would be computed upon 6.011% of its authorized capital stock, which would make plaintiff's authorized capital stock allocated to the State of Washington, $15,027,500.00. Applying the rates named in said statute, plaintiff's annual license fee due July 1, 1933, would amount to the sum of $1,103.88, as shown by the following [fol. 33] computation:

Capital Stock Allocated to Washington under Chapter 227, Session Laws 1929		Amount of Fees
From 0 to $50,000	$50,000	$15.00
From 50,001 to 1,000,000	950,000	237.50
From 1,000,001 to 4,000,000	3,000,000	300.00
In Excess of 4,000,000	11,027,500	551.38
Total	$15,027,500	$1103.88

Since said annual license fee, amounting to $1103.88, payable July 1, 1933 to the Secretary of State, under Chapter 227, Session Laws 1929, is less than the annual fee paid to the Department of Public Works on March 24th, 1933, under the provisions of Section 8, Chapter 227, Session Laws 1929, there will be no fee due, and none will be paid to the Secretary of State. If Chapter 107, Session Laws 1929, should be held unconstitutional and void as to the plaintiff herein, then there would be due the Department of Public Works under Chapter 107, Session Laws 1923, an annual gross operating license fee of $1500, and since the annual license fee due July 1, 1933 to the Secretary of State under Chapter 227, Session Laws 1929, would be less than said annual gross operating license fee due the Department of

Public Works on March 24th, 1933, under said Chapter 107, Session Laws 1923, under the provisions of Section 8 of said Chapter 227, Session Laws 1929 there would be no fee due the Secretary of State. If Chapter 107 Session Laws 1929 and Chapter 107, Session Laws 1923, should both be held unconstitutional and void as to the plaintiff herein, then there would be due the Secretary of State under Chapter 227, Session Laws 1929, the annual license fee payable to the Secretary of State July 1, 1933, computed as hereinabove set forth, and amounting to the sum of $1103.88, less the fee of $600 payable to the Department of Public Works under Chapter 113, Session Laws 1921, unless said Chapter 227, Session Laws 1929, should also be held unconstitutional [fol. 34] and void. In the event the last mentioned statute should also be held unconstitutional and void as to the plaintiff herein, then there would be due the Department of Public Works under Chapter 113, Session Laws 1921, an annual gross license fee of $600, unless said Chapter 113, Session Laws 1921, should also be held unconstitutional and void.

XII

Plaintiff hereby adopts and realleges paragraph XII of its first cause of action herein, as paragraph XII of this, its fourth cause of action.

XIII

Plaintiff built and equipped its line of railroad in the State of Washington more than thirty-five years ago and before said Chapter 113 Session Laws of 1921, Chapter 107 Session Laws of 1923 and Chapters 107 and 227 Session Laws of 1929, or any of them, were enacted, and has expended more than one hundred million dollars therefor. It then commenced, and ever since has carried on both interstate and intrastate commerce in said state. In 1905, long after plaintiff had constructed and equipped its line of railroad in this state there was enacted Chapter 81 Session Laws of 1905, entitled, "An Act to Establish a Railroad Commission for the State of Washington", etc., followed in 1911 by the amendment of the Public Service Commission Law, mentioned in Paragraph III hereof. By the Constitution of the State of Washington and by said statutes and acts amendatory of said statutes and supplemental

thereto, and by the Acts of Congress regulating interstate commerce, particularly Section 1 (18)-(21), Section 13, Section 15a and Section 19a thereof, there is imposed upon plaintiff an obligation to devote its property to the service of the people of said state in intrastate transportation, from which it cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce. Plaintiff's investment, prior to the enactment of said laws, was made to provide adequate facilities for the handling of both interstate and intrastate commerce, and a substantial part thereof was made by order of the [fol. 35] Railroad Commission of Washington, and its successors, the Public Service Commission and Department of Public Works for the purpose of equipping its property to comply with said Public Service Commission law. Plaintiff's railroad system comprises approximately 10,541 miles of track, of which approximately 1450 miles are in the State of Washington. It is taxed in the State of Washington pursuant to Chapter 130 Laws Special Session of 1925, at its fair market value, considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. Said acts, including said Chapter 107 Session Laws of 1929, do not levy a property tax in lieu of all other taxation, for the reason that plaintiff's property is fully taxed on an ad valorem basis, as aforesaid. Plaintiff's gross operating revenue for business done in the State of Washington for the year 1932 was the sum of $8,389,154.43, of which $3,338,973.43 was from intrastate commerce and $5,050,181.00 from interstate commerce. Both classes of business were and are carried by plaintiff in the same trains, operated by the same employes, over the same lines of railroad, and are inextricably commingled, so that it is not and was not possible, practically and economically, or at all, to carry interstate commerce separately from intrastate commerce in different trains, or by means of different instrumentalities or employes, or on different lines. It was not and is not, as a practical matter, or at all, possible for plaintiff to withdraw from its intrastate commerce and continue its interstate commerce. The taxes imposed on plaintiff by said Chapter 113 Session Laws 1921, Chapter 107 Session Laws 1923 and Chapters 107 and 227 Session Laws of 1929, and each of them, whether viewed as taxes or

fees for the privilege of doing intrastate business in the State of Washington or otherwise, are in truth and in fact fees or taxes exacted for the privilege of doing interstate business in this state as a common carrier by railroad, and for the privilege of transporting mail, express, freight and passengers for the government of the United States, and are fees or taxes which plaintiff cannot avoid by withdrawing its property from use in intrastate commerce, either [fol. 36] under the State Constitution, said Public Service Commission Law of the State of Washington, under the acts of Congress regulating interstate commerce, or as a practical matter, or at all, and said fees so exacted by said laws, and each of them, constitute a burden upon interstate commerce, and upon an agency devoted thereto, and said laws, and each of them are in violation of Section 8, Article I of the Constitution of the United States, of the acts of Congress regulating interstate commerce, and of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and are null and void.

XIV

Plaintiff's authorized capital of $250,000,000 is invested in and represents the property and railway lines of the plaintiff located in the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana, Idaho, Oregon and California, and in the Dominion of Canada, as well as in the State of Washington, and other property and securities in other companies, not included in its said system of transportation, substantially all of which property and securities in other companies are located outside the State of Washington, and have a value of over Two Hundred Million Dollars. Plaintiff's line of railroad, of which plaintiff's railroad in the State of Washington is a component part, has a value of several hundred million dollars. In the year 1932 the full true cash value of plaintiff's operating property in the State of Washington for taxation purposes, as fixed by the Tax Commission of said state as provided by statute, was the sum of $69,574,000.00, and the equalized value as determined by the State Equalization Committee in accordance with the statutes in such cases made and provided, upon which value general taxes were levied and assessed against the plaintiff's property within the State of Washington for the year 1932, was the

sum of $30,710,723.00. If the statutes of the State of Washington and of the United States permitted the plaintiff to withdraw from intrastate commerce in said state while still continuing its functions of a common carrier of [fol. 37] interstate commerce therein, its very large property investment in the State of Washington, and the present or future public convenience and necessity would not permit plaintiff, as a practical matter, to discontinue its said intrastate business. If the Constitution and statutes of the State of Washington permitted the plaintiff to withdraw from intrastate commerce in said state, it could not withdraw therefrom under the statutes of the United States.

XV

Plaintiff hereby adopts and realleges Paragraph XV of its first cause of action herein, as Paragraph XV of this, its fourth cause of action.

XVI

Plaintiff hereby adopts and realleged Paragraph XVI of its first cause of action herein, as Paragraph XVI of this, its fourth cause of action.

XVII

The exaction from the plaintiff by the defendant of said tax of $3,338.97, or of any tax or license fee imposed by said statutes or any of them, was and is contrary to the Constitution of the United States and the Fourteenth Amendment thereto, as hereinabove alleged.

Wherefore, plaintiff prays judgment against the defendant as follows:

1. On its first cause of action for the sum of $8027.77, with interest thereon at the legal rate from March 31, 1930.

2. On its second cause of action for the sum of $7267.08, with interest thereon at the legal rate from March 26, 1931.

3. On its third cause of action for the sum of $5528.98, with interest thereon at the legal rate from March 29, 1932.

4. On its fourth cause of action for the sum of $3338.97, with interest thereon at the legal rate from March 24, 1933.

[fol. 38] 5. Together with its costs and disbursements incurred herein.

Thomas Balmer, Edwin C. Matthias, Attorneys for Plaintiff, Great Northern Railway Company. Office and Post Office Address: 305 Great Northern Railway Bldg., 404 Union Street, Seattle, Wash.

Duly sworn to by Edwin C. Matthias. Jurat omitted in printing.

[fol. 39] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ANSWER TO AMENDED COMPLAINT—Filed Aug. 16, 1934

Comes now the defendant and in answer to the Amended Complaint of the plaintiff herein alleges as follows, to-wit:

That in answer to the first cause of action contained in said Amended Complaint, defendant alleges:

I

That it denies each and every allegation, matter and thing in paragraph I of said first cause of action, and each and every part and parcel thereof excepting that the plaintiff is a corporation and has filed a certified copy of its articles of organization and a certified copy of its certificates of increase of capital stock, and a certificate of its appointment of a resident agent, with the Secretary of State of the State of Washington.

II

Defendant denies each and every allegation, matter and thing contained in paragraphs XII, XIII, XIV, XV, XVI and XVII of said first cause of action and each and every part and parcel thereof excepting that the gross operating revenue for business done by plaintiff in the state of Washington for the year 1929 for interstate and intrastate business was as alleged in said paragraph XIII. And that the

[fol. 40] Department of Public Works exercises jurisdiction and supervision over many classes of public utilities including common carriers in the state of Washington, and that property belonging to plaintiff in the state of Washington is assessed upon an ad valorem basis for taxation like other property within the state.

That in answer to the second cause of action contained in said Amended Complaint, defendant alleges:

I

That as to paragraphs I to VII inclusive, and paragraphs XII, XV and XVI, incorporated in said cause of action by reference to the first cause of action in plaintiff's complaint, defendant adopts the denials of the corresponding paragraphs in its answer to plaintiff's said first cause of action.

II

That in answer to paragraphs XIII, XIV and XVII, of said second cause of action, defendant denies each and every allegation, matter and thing therein contained and each and every part and parcel thereof excepting that the gross operating revenue for business done by plaintiff in the state of Washington for the year 1930 for interstate and intrastate business was as alleged in said paragraph XIII. And that the Department of Public Works exercises jurisdiction and supervision over many classes of public utilities including common carriers in the state of Washington, and that property belonging to plaintiff in the state of Washington is assessed upon an ad valorem basis for taxation like other property within the state.

[fol. 41] That in answer to the third cause of action contained in said Amended Complaint, defendant alleges:

I

That as to paragraphs I to VII inclusive, and paragraphs XII, XV and XVI, incorporated in said cause of action by reference to the first cause of action in plaintiff's complaint, defendant adopts the denials of the corresponding paragraphs in its answer to plaintiff's said first cause of action.

II

That in answer to paragraphs XIII, XIV and XVII, of said third cause of action, defendant denies each and every allegation, matter and thing therein contained and each and every part and parcel thereof excepting that the gross operating revenue for business done by plaintiff in the state of Washington for the year 1931 for interstate and intrastate business was as alleged in said paragraph XIII. And that the Department of Public Works exercises jurisdiction and supervision over many classes of public utilities including common carriers in the state of Washington, and that property belonging to plaintiff in the state of Washington is assessed upon an ad valorem basis for taxation like other property within the state.

That in answer to the fourth cause of action contained in said Amended Complaint, defendant alleges:

I

That as to paragraphs I to VII inclusive, and paragraphs XII, XV and XVI, incorporated in said cause of action by reference to the first cause of action in plaintiff's complaint, defendant adopts the denials of the corresponding paragraphs in its answer to plaintiff's said first cause of action.

[fol. 42] II

That in answer to paragraphs XIII, XIV and XVII, of said fourth cause of action, defendant denies each and every allegation, matter and thing therein contained and each and every part and parcel thereof excepting that the gross operating revenue for business done by plaintiff in the state of Washington for the year 1932 for interstate and intrastate business was as alleged in said paragraph XIII. And that the Department of Public Works exercises jurisdiction and supervision over many classes of public utilities including common carriers in the state of Washington, and that property belonging to plaintiff in the state of Washington is assessed upon an ad valorem basis for taxation like other property within the state.

Wherefore, defendant prays that plaintiff take nothing by its action and that said action be dismissed and that the defendant recover its costs and disbursements herein.

G. W. Hamilton, Attorney General, Geo. G. Hannan, Assistant Attorney General, Attorneys for Defendant.

[fol. 43] *Duly sworn to by Geo. G. Hannan. Jurat omitted in printing.*

[fol. 44] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

Findings of Fact and Conclusions of Law—Filed April 1, 1935

This cause came on regularly for trial before the Honorable D. F. Wright, Judge of the above entitled court, trial by jury having been waived in the manner prescribed by the laws of the State of Washington. The plaintiff appeared by its Assistant Attorney General, Mr. George G. Hannan, and the defendant appeared by its attorney, Mr. Edwin C. Matthias. Evidence was introduced by both parties, and thereafter when both parties had rested the court took the case under advisement, and now, having duly considered all the evidence and the arguments and briefs of counsel, makes the following

FINDINGS OF FACT

I

This is an action by plaintiff to recover from the State the annual fees paid under protest to the Department of Public Works under Chapter 107, Laws of 1929 (R. C. S. 10417) for the calendar years 1929 to 1932, inclusive, over and above the fees due to the Department of Public Works under Chapter 107, Laws of 1923, which latter statute is revived if Chapter 107, Laws 1929 is held unconstitutional, and over and above the fees due to the Secretary of State

under Chapter 227, Laws 1929. The action was tried upon the amended complaint, in which recovery is prayed for the years 1929 to 1932, inclusive. The fee for the year 1933, which was also paid under protest, was included by stipulation that the amended complaint should be considered as so further amended and the demurrer, motion and answer should apply thereto. The amended complaint also attacked the fees payable to the Department of Public Works under Chapter 113, Laws 1921, as amended by Chapter 107, Laws 1923, and to the Secretary of State under [fol. 45] Chapter 227, Laws 1929, but at the trial the plaintiff did not question the validity of those statutes.

II

At all times mentioned herein and in the amended complaint the plaintiff was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Minnesota. It has filed with the Secretary of State of the State of Washington a certified copy of its charter and a certified copy of each and all of its certificates of increase of capital stock, and a certificate of its appointment of a resident agent in the State of Washington to accept service of process, and has paid all annual license fees due the State of Washington, and complied with all the laws of said state relating to foreign corporations.

II-B

At all times mentioned herein and in the amended complaint plaintiff owned and operated, and now owns and operates a transportation system of railway lines and branches, having its eastern termini at St. Paul and Duluth in the State of Minnesota, and Superior in the State of Wisconsin, and extending westerly from said termini through the States of Minnesota, North Dakota, Montana, Idaho, Washington, Oregon and California, with its western termini at Seattle and Tacoma in the State of Washington and Portland in the State of Oregon. Said line of railroad was constructed more than thirty-five years ago, and is now, and for more than thirty-five years last past has been, a public utility devoted to and used for the transportation, as a common carrier, of passengers and freight, both intrastate and interstate, and for the transportation

of mail, express, freight and passengers for the government of the United States, and has been, and is now, an instrumentality of interstate commerce and of the commerce of the government of the United States. Plaintiff is subject to Chapter 117, Laws 1911, known as the Public Service Commission Law of Washington, and acts amenda- [fol. 46] tory thereof and supplemental thereto, and to the acts of Congress regulating interstate commerce.

III

The Department of Public Works of Washington is an administrative tribunal, with three members, namely, a director and two supervisors, with the usual powers of regulation and supervision of railroads and other public utilities, and is charged with the performance of a variety of duties, other than those pertaining to railroads and utilities. It is divided into two divisions, known as the "Division of Transportation" and "Division of Public Utilities". The Division of Transportation is under a "Supervisor of Transportation" and the Division of Public Utilities is under a "Supervisor of Public Utilities". The Director of the Department has general supervision of all its activities. The Supervisor of Transportation is concerned specially with railroads, water carriers, street railways and other transportation agencies. The Supervisor of Public Utilities is concerned specially with telephone and telegraph companies, electrical companies, gas companies and other public utilities.

The jurisdiction of the Department of Public Works is summarized in its Annual Report to the Governor for the period ending December 1, 1932 to November 30, 1933, introduced in evidence in this case on page 5 thereof, as follows:

"Jurisdiction of Department

The regulatory powers of the State of Washington are exercised over telephone and telegraph companies, light and power companies, water and irrigation companies, gas companies, docks, warehouses, ferries and other water, freight and transportation companies, railroads, street railways, auto, passenger and freight transportation companies and all trucks engaged in transporting property outside

city limits for compensation, or sold or to be sold in the performance of a commercial enterprise, or for lease, rent or bail. In addition the Department has jurisdiction over railroad crossings and the inspection of railroad scales."

[fol. 47] IV

Chapter 107 Laws 1929 provides that every corporation

"engaged in business as a public utility and subject to regulation as to rates and charges by the Department of Public Works, except auto transportation and steamboat companies holding certificate under Chapter 248 Laws 1927, shall file with the Department of Public Works on or before April first annually, a statement showing its gross operating revenue for the preceding calendar year, and pay to the Department a fee of 1/10 of 1% thereof."

The Public Service Commission Law (Section 10344 R. C. S.) defines the terms used in the Act.

A Public Service Company is defined as follows:

"Every common carrier, gas company, electrical company, water company, telephone company, telegraph company, wharfinger and warehouseman, as such terms are defined in this section."

Common carriers are defined as follows:

"All railroads, railroad companies, street railroads, street railroad companies, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies, and every corporation * * * operating * * * any such agency for public use in the conveyance of persons or property for hire within this state.

IV-B

Chapter 227 Laws 1929 (Section 4) provides that

"every corporation organized under the laws of this state, except the corporations for which existing law provides a different fee schedule, shall pay, on or before the first day of July of each and every year, to the Secretary of State, for the use of the state, an annual fee of $15 for the first $50,000 or less of its authorized capital stock, and 1/40 of

1% additional on all amounts in excess of $50,000, and not exceeding $1,000,000, and 1/100 of 1% additional on all amounts in excess of $1,000,000, and not exceeding $4,000,000, and 1/200 of 1% additional on all amounts in excess of $4,000,000, but in no case shall an annual license fee exceed the sum of $1250."

Section 5 of said chapter provides:

"All foreign corporations doing intrastate business, or hereafter seeking to do intrastate business in this state, shall pay for the privilege of doing such intrastate business in this state the same fees as are prescribed for domestic corporations for annual license fees in the preceding section, such fees to be computed upon the proportion of the capital stock represented or to be represented by its property and business in this state, to be ascertained by comparing the entire volume of business with the volume of intrastate business in this state."

It is also provided in Section 8 of said chapter that "the annual fee required to be paid to the Department of Public [fol. 48] Works by any public service company, shall be deducted from the annual license fee provided herein, and the excess only shall be collected."

IV-C.

At all times mentioned herein and in the amended complaint plaintiff's authorized capital stock was, and is now the sum of $250,000,000.

The following tabulation shows in the first column the year; in the second column the percentage relationship between the volume of plaintiff's intrastate business and its entire volume of business for said year; in the third column the amount of plaintiff's capital stock allocated to Washington for said year, based upon said business volume percentage as applied to its total authorized capital stock, as provided by Chapter 227 Laws 1929, and in the last column the annual license fees due for said year payable to the Secretary of State on July first of the succeeding year.

Year	Business Volume Percentage	Capital Stock Allocated to Washington	Fee Payable to Secretary of State
1929	6.375%	$15,937,500	$1,149.38
1930	6.921%	17,302,500	1,217.63
1931	7.172%	17,930,000	1,249.00
1932	6.011%	15,027,500	1,103.88
1933	5.065%	12,662,500	985.60

V

Plaintiff filed with the Department of Public Works, within the time and as required by law, the statement showing its gross operating revenue for the calendar years 1929 to 1933, inclusive, and paid to the Department of Public Works a fee of 1/10 of 1% thereof for each of said years, as required by Chapter 107 Laws 1929, amounting in the aggregate to the sum of $27,299.85.

For each of the years 1929 and 1930 there was due the Department of Public Works under Chapter 107 Laws 1923 a fee of $1500. For each of the years 1931 to 1933, inclu- [fol. 49] sive, there was due the Department of Public Works under Chapter 107 Laws 1923 a fee of $1,000.

In accordance with the provisions of Chapter 107 Laws 1923 and Chapter 227 Laws 1929, and allowing for the deduction from the annual license fee payable to the Secretary of State the amount of the annual fee payable to the Department of Public Works, the following fees were due from the plaintiff to the State of Washington for the years 1929 to 1933, inclusive:

1929	$1500.00
1930	1500.00
1931	1249.00
1932	1103.88
1933	1000.00

The following tabulation shows in the first column, year for which the fees were paid by the plaintiff; in the second column the date upon which the fees were paid; the third column the amount of fees paid under Chapter 107 Laws 1929; in the fourth column the fees due under Chapter 107 Laws 1923 and Chapter 227 Laws 1929; the fifth column the balance after deducting the fees due under Chapter 107 Laws 1923 and Chapter 227 Laws 1929 from the fees paid under Chapter 107 Laws 1929; the sixth column, interest calculated on said balance at 6% from the date of the respective payments to the first day of April, 1935, and the seventh column the total amount of fees paid under Chapter 107 Laws 1929, over and above the fees due under Chapter 107 Laws 1923 and Chapter 227 Laws 1929, including interest.

[fol. 50]

Year	Date Paid	Amt. Paid	Fees due Chap. 107 L. 1923 and Chap. 227 Laws 1929	Balance	Int. at 6% to 4/1/35 on Bal.	Total Due
1929....	3/31/30	$8,027.77	$1,500.00	$6,527.77	$1,958.33	$8,486.10
1930....	3/26/31	7,267.08	1,500.00	5,767.08	1,388.89	7,155.97
1931....	3/29/32	5,528.98	1,249.00	4,279.98	771.81	5,051.79
1932....	3/24/33	3,338.97	1,103.88	2,235.09	270.81	2,505.90
1933....	3/27/34	3,137.05	1,000.00	2,137.05	129.66	2,266.71
		27,299.85	6,352.88	20,946.97	4,519.50	25,466.47

VI

Said payments and each of them were made to the Department of Public Works by plaintiff under protest, plaintiff alleging and protesting that said Chapter 107, Laws 1929, as applied to it, was void under the commerce clause of the Fourteenth Amendment to the Constitution of the United States, in that said chapter imposes a tax on plaintiff's property devoted to commerce among the states and with foreign nations, and a tax upon and a regulation of such commerce in violation of Section 8, Article I of the Constitution of the United States, and operates to tax the property of said Railway Company in other states having no taxable situs in Washington, and thus deprives it of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that said tax or fee is discriminatory and unequal as between said plaintiff and others similarly situated, and thus denies said plaintiff the equal protection of the laws, in violation of said Fourteenth Amendment to the Constitution of the United States, and that the tax imposed by said statute is in violation of the Constitution of the United States, in that it is imposed at least in part for the purpose of regulating and inspecting other public utilities, in no way related to or connected with the business of operating a common carrier railway, and for the purpose [fol. 51] of defraying the expenses of performing functions and furnishing services entirely disconnected with the regulation of railroads, and for the purpose of regulating and supervising interstate services, facilities and rates of railroads engaged in interstate commerce; that the tax is imposed and used in part for the purpose of defraying the expenses of the Department of Public Works in proceed-

ings before the Interstate Commerce Commission in connection with interstate rates, services and facilities, and that no such tax is imposed upon persons directly benefited by such proceedings, and that the fees collected have exceeded the cost of regulation and inspection of the railroads by such a large sum that the tax imposed by said statute is unreasonable and disproportionate to the services rendered, and that Chapter 107, Laws 1929 in effect levies a tax upon revenue derived from the transportation of mail, passengers, freight and express for the government of the United States, and thereby imposes a burden upon, and interferes with, the exercise of governmental powers of the Federal Government, which the Constitution of the United States contemplates shall be supreme and independent of state supervision or regulation, and for said reasons the tax or fee imposed by said Chapter 107, Laws 1929, is unlawful, null and void as to the plaintiff.

VII

In addition to the fees paid under said Chapter 107, Laws of 1929, by railroads and public utilities known as "filing fees" or "report fees", the Department of Public Works receives other fees. The following is a copy of a "financial statement" on page 79 of the annual report of [fol. 52] the Department to the Governor for 1933. It is typical of the other years.

"Receipts

	Dec. 1, 1932 to Mar. 31, 1933	Apr. 1, 1933 to Nov. 30, 1933	Total Fiscal Year Ending Nov. 30, 1933
Auto Transportation, gross revenue fees	$11,979.37	$35,201.53	$47,180.90
Auto Transportation, application fees	110.00	1,566.00	1,676.00
Report filing fees	31,395.27	28,397.54	59,792.81
Motor Vehicle Permit, gross revenue fees	.....	8,649.69	8,649.69
Motor Vehicle Permit, application fees	.....	14,750.00	14,750.00
Motor Vehicle Permit, plate fees	.....	6,133.00	6,133.00
Storage Warehouse, gross revenu fees	.....	5.00	5.00
Storage Warehouse, application fe s.	.....	1,130.00	1,130.00
Scale Test fees	200.00	1,800.00	2,000.00
Utility Overcharge fees	91.13	99.95	191.08
Miscellaneous Fees	701.96	1,739.92	2,441.88
Certified Boat fees	3,536.94	853.86	4,390.80
Special Case Cost fees	.....	3,055.08	3,055.08
Totals	$48,014.67	$103,381.57	$151,396.24"

VIII

Upon taking effect of Chapter 107, Laws 1929, and payment of fees thereby imposed and fees imposed upon other businesses subject to the jurisdiction of the Department, the legislature made no appropriation for the expenses of the Department's activities from the general fund. The expenses of all of the Department's activities were payable only from such fees, except that the legislature, at its session of 1933, appropriated $250,000 for the use of the Department in conducting certain special investigations and valuations of public utility companies other than railroad or transportation companies, as will appear on page 200 of the annual report of the Department to the Governor for the year ending November 30, 1934.

The receipts of the Department of Public Works paid by railroad and public utility corporations and receipts of the [fol. 53] Department from other sources provided by law, as hereinbefore stated, were and have been commingled in one common fund. The report and filing fees paid by railroads and other utilities were and have been at all times commingled together into a common fund and expenses incurred by the Department in supervising and regulating railroads and other common carriers, gas companies, electrical companies, water companies, telephone companies, telegraph companies, wharfingers and warehousemen, have been paid out of said common fund.

IX

Said Chapter 107, Laws of 1929, does not provide that the fee paid by railroads shall be devoted to the expense of supervising and regulating railroads nor limited by such expense; but said fee of 1/10 of 1%, paid by railroads and other public utility companies above described, is a fee required to be paid by said Chapter 107, Laws of 1929, to defray the expenses of the Department of Public Works in supervising and regulating railroads and said other public utility companies. The Department of Public Works, in 1929 to 1934, inclusive, incurred large expenses in the discharge of its duties relating to public utility companies other than railroads and incurred a relatively small expense in the discharge of its duties relating to the regulation and supervision of railroads. The Department is not

required by the act to keep an account, and has kept no account, of the cost of performing its supervisory and regulatory duties relating to railroads separate and apart from the cost of performing its supervisory and regulatory duties relating to said other public utility companies. It is not and has not been, possible to separate and compute the cost of performance by the Department of Public Works of its supervisory and regulatory duties relating to railroads from the cost and expense of its supervisory and [fol. 54] regulatory duties relating to telephone and telegraph, electrical, water, gas and other public utility corporations. Nor is the Department required by law to keep, nor has it in fact ever kept any account of the expenses incurred by the Division of Transportation in the discharge of its duties separately from the expenses incurred by the Division of Public Utilities in the performance of its duties, and it is not and was not possible to compute the expenses incurred by said Division of Transportation separately and apart from the expenses incurred by said Division of Public Utilities.

X

In addition to its supervisory and regulatory duties relating to railroads said Department is required by law to perform various other duties and functions relating to railroads of a non-supervisory and non-regulatory nature; in particular, the Department has the duty of prosecuting or defending various rate cases before the Interstate Commerce Commission relating to rates of interstate railroads and to rates of railroads operating in other states and not subject to its jurisdiction. It pays all of its expenses incurred in the discharge of those functions and duties out of said filing or report fees paid by railroad companies and public utilities. Shippers and the public generally who are parties to or are or may be benefited by said proceedings before the Interstate Commerce Commission pay no portion of the expenses of said proceedings and no fee or tax is imposed upon them for that purpose, although all such parties, including plaintiff, are taxed on their property upon an ad valorem basis to defray governmental expenses. The following is quoted from page 1 of the Department's report to the Governor for the year 1930 and is illustrative of its functions in this particular, to-wit:

"An important part of the duties of the Department of Public Works is that of seeking relief before the Interstate Commerce Commission in matters of interstate rates where they adversely affect citizens of Washington. It also participates in other rate cases when the matter involves con- [fol. 55] ditions or activities in this state. The Department during the past year participated in many proceedings before the Interstate Commerce Commission. The following include the more important matters with which it was engaged:"

The report follows with the particulars of the activities of the Department in connection with matters pending before the Interstate Commerce Commission wherein it appeared and took part as a litigant and in an advisory capacity to the Interstate Commerce Commission, in some instances lining up on the same side as the railroads operating in this state, including plaintiff, in other instances taking the opposite side, and in still others taking sides as between railroads operating in this state. In one case in particular before the Interstate Commerce Commission in which the Department of Public Works appeared on behalf of the State of Washington in a contested case which resulted in a lengthy hearing and later in proceedings in the courts was involved the question whether the Interstate Commerce Commission could order the construction of a cross-state railroad line in the states of Oregon and Idaho. (See pp. 4 and 6 of 1929 and 1930 Annual Reports of Department, introduced in evidence as Exhibits 9 and 8, respectively, under title on said pages "Railroad Extension between Homestead, Oregon and Lewiston, Idaho.") The Department incurred a large expense in said non-regulatory and non-supervisory activities, but no account is required to be kept or was kept of the amount thereof and it is impossible to determine the same, and no attempt was made to do so on the trial of this case.

X-B

The Department of Public Works has also undertaken to act in a judicial capacity in overcharge and reparation cases filed in that department by shippers against railroads, including plaintiff, and has held hearings, taken testimony and made and entered awards in many of such cases in favor of the shippers and against the railroads, including

[fol. 56] plaintiff. Said Department pays and has paid all of its expenses incurred in such reparation cases out of said Filing or Report Fees paid by the railroad companies and public utilities. In the year 1929, 14 of the formal proceedings before said Department were against railroads to recover on overcharge or reparation claims. In the year 1930 there were 22 such cases before the Department; in the year 1932 twenty; and in the year 1933, thirty. (See pp. 3-16 of 1929 Annual Report, Exhibit 9; pp. 5-18 of 1930 Annual Report, Exhibit 8; pp. 22-36 of 1932 Annual Report, Exhibit 6 and pp. 13-42 of 1933 Annual Report, Exhibit 5.) The number of such cases for the year 1931 was substantially the same. Plaintiff's railroad is taxed in the State of Washington, and was so taxed during the years 1929 to 1933, inclusive, under and by virtue of Chapter 130, Washington Special Session Laws 1925, on its fair market value considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. During said years 1929 to 1933, inclusive, in addition to said ad valorem taxes, the plaintiff also paid said fees to the Department of Public Works under Chapter 107, Laws of 1923, while no such fees to the Department of Public Works were paid or are required to be paid by statute by said shippers who were parties to said overcharge and reparation proceedings. The Department incurred a large expense in said overcharge and reparation cases, but no account is required to be kept or was kept of the amount thereof, and it is not only impossible to determine the cost of such cases to the Department, but no attempt was made to do so in the trial of this case.

XI

The accumulation of the amounts paid by railroads and other public utility corporations and other receipts of the Department over the period 1929 to 1933, inclusive, are shown in the annual reports of the Department to the Governor in a financial statement appended thereto. At the end of 1933, as shown on page 79 of the report for 1933, there was a surplus in the Department's fund amount-[fol. 57] ing to $224,193.95. The receipts of the Department from all sources were in excess of the expenditures of the Department in the performance of its manifold duties and

activities during said period by said amount. But no separate accounts were kept or required to be kept, with the various public utility companies concerned, and it is impossible to determine what was the expense of regulating and supervising railroads separately from the expense of regulating and supervising other public utility corporations with which the funds contributed by railroads were commingled; and it is impossible to determine what was the expense incurred by the Department in discharging its functions and duties not relating to supervising and inspecting railroad companies and other public utilities all of which were required by law to be paid and were in fact paid out of said common fund. But the court finds that the activities of the Department connected with the regulation and supervision of railroads are and were at all times relatively unimportant and inexpensive in comparison with the time devoted to and the cost incurred by the Department in regulating and supervising auto transportation companies and motor vehicle operations, and its activities relating to and expenses incurred in the regulation and supervision of telephone, electrical, gas, water and public utility corporations other than railroads and in its non-regulatory activities relating to railroads. The activities of the Department relating to the discharge of its manifold functions and duties are stated in detail in its several annual reports to the Governor offered in evidence in this cause. Said balance of $224,193.95 and said additional sums appropriated by the legislature in 1933 were expended by the Department in 1934 in carrying on investigations of and litigation with public utility corporations other than railroads and with which railroads, including plaintiff, were [fol. 58] in no way concerned, as more fully appears from the Department's report to the Governor for 1934. See especially pages 11 and 91 et seq. thereof.

XII

From a consideration of Chapter 107, Laws of 1929, and the annual reports of the Department, and other facts of record herein, the court finds that said act does not and was not intended to impose a fee on railroads commensurate with and to pay the cost of their proper supervision and regulation by the Department of Public Works. Said

Chapter 107, Laws of 1929, and the fee imposed thereby on railroad companies, including plaintiff, is in fact a revenue measure intended to impose, and which does impose, upon railroads and other utility corporations the cost and expense of regulating and supervising railroads and other utility corporations and to defray the cost and expense of all of the activities of the Department whether or not of a regulatory and supervisory nature and the excess collected over expenditures reverts to and is a part of the general funds of the state.

XIII

The complaint attacks Chapter 107, Laws of 1929, in two respects, viz: first, as an occupation or license fee for the privilege of doing business; and second, as a regulatory fee to defray expenses of the Department of Public Works. Since the complaint was filed the Supreme Court has held, in Pacific T. & T. Co. v. Seattle, 172 Wash. 649, that the fee is for the latter purpose. This was recognized at the argument and so much of the complaint as attacks the act as imposing an occupation or privilege tax has become irrelevant and will be disregarded.

Done in open court this 1 day of April, 1935.

D. F. Wright, Judge.

[fol. 59] Pursuant to the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I

The state may impose on a railroad or other corporation or business the cost of its supervision. The principle is that where a business is of such nature that it needs regulation the cost may be imposed on the one conducting it. In such case regulation and supervision is in the interest and for the benefit as well of the corporation regulated as of the public. Charlotte etc. R. Co. v. Gibbs, 142 U. S. 386; New York vs. Squier, 145 U. S. 75; Postal T. Co. vs. New Hope, 192 U. S. 55; Atlantic & Pacific Tel. Co. vs. Philadelphia, 190 U. S. 160. But this just principle is circumscribed and limited by the reasons for it. Therefore, a regulatory fee must be devoted to and limited by the cost of reasonable and necessary supervision and regulation within a margin

of reasonableness known from experience. If the fees exceed these limitations it is not what it purports to be; nor can a court uphold so much of the fee as is reasonable, for to do that is to occupy the legislative field. Atlantic & Pacific T. Co. vs. Philadelphia, supra. Having regard for the purpose of the fee and the limitation upon the amount, it follows, as of course, that railroad companies may not be charged with the expense of regulating electrical companies, telephone and telegraph companies, water companies and other unrelated businesses, requiring supervision and regulation, any more than a tax may be imposed on oil to pay the cost of inspection of grain, or a tax upon grain to pay for the inspection of wool and hides, etc. Each kind of business and each article may be charged only with the expense of its own regulation or inspection. This principle is clearly implied in the cases cited. It follows from the nature of the tax. See also State vs. Standard Oil Co., 161 N. W. 537. The opinions in Davis-Smith vs. Clausen, 65 Wash. 156, and Mountain Tbr. Co. vs. Wash., [fol. 60] 243 U. S. 219, sustaining the state industrial insurance act, involve the same principle and are in point. Other cases in that category are Noble State Bank vs. Haskell, 219 U. S. 104, sustaining a bank guaranty law; Hendrick vs. Maryland, 235 U. S. 610, sustaining license fees for auto vehicles as compensation for the use of improved roadways for a class of users for whose needs they were constructed. Statutes of that kind are familiar examples of legislation of antiquity, of which, perhaps, the earliest example is a tax upon the owners of dogs to pay for sheep they may kill. The principle common to all of these laws is propriety of imposing a special burden on a class responsible for the need thereof. Never has the principle been applied, nor can it ever be applied consistently with constitutional guarantees, to impose a tax upon some to discharge an obligation for which others are responsible. It is obvious that Chapter 107, Laws of 1929, is not animated by this just principle. It imposes on railroads and a variety of public utility companies a flat fee of 1/10 of 1 percent of the gross income of all of them to pay the expenses incurred by the Department in regulating and supervising all of them. The fee paid by railroads is not devoted by the act to the expense of supervising and regulating railroads. When collected it is a part of the general fund subject to appropriation for any

purpose chosen by the legislature. There is no provision in the act for ascertaining the cost incurred by the Department in supervising railroads separately from the cost it incurs in supervising and regulating public utility corporations whose business and activities have no relation to railroads. It is true that a state may, for reasons of convenience or economy, impose upon a single tribunal a variety of functions. But, if it does so, it must also provide that the tax imposed upon each business be devoted to super- [fol. 61] vision and regulation of that business and be not unreasonably in excess thereof. State vs. Standard Oil Co., supra. In all such cases the burden is on him who seeks to uphold such a tax to show the facts necessary to its validity. Foote vs. Stanley, 232 U. S. 494.

II

Chapter 107, Laws of 1929, offends in another particular. The functions and duties of the Department relating to railroads include many which are not regulatory or supervisory in their character, particularly its duties in connection with proceedings before the Interstate Commerce Commission involving interstate rates, and which, in many if not all instances, involve railroads not operating in the state, nor subject to the Department's jurisdiction, are not supervisory or regulatory in their nature. The expense of such activities may not be charged to railroads operating in this state, including plaintiff, under the pretext of a fee to pay the expenses of supervising and regulating their own business. In taking part in litigation before the Interstate Commerce Commission the Department acts much as any other litigant who seeks to assist the court or tribunal in reaching a correct conclusion. The functions and duties of the Department with respect to overcharge and reparation cases are judicial rather than supervisory and regulatory in character and the expense of such proceedings may not be charged exclusively to the railroads, including plaintiff, and other public utilities under the pretext of a fee to pay the expenses of supervising and regulating the business of such railroads when both the railroads, including plaintiff, and the other parties to such cases, are taxed upon their property upon an ad valorem basis for the purpose of defraying the cost of performing judicial and other functions of the state government. However beneficial all of such activi-

[fol. 62] ties, functions and duties of the Department may be, they are not of a regulatory or supervisory nature and the expense must be met by general taxation. There are many other instances of non-supervisory and non-regulatory activities and functions of the Department shown by their annual reports, but those instanced above are sufficient to make the point. The Department, as is also shown by its annual reports, incurs large expense in such non-supervisory and non-regulatory activities. All these expenses are payable out of the fee charged by Chapter 107, Laws of 1929. The act makes no provision for keeping this class of expenses separate from expenses incurred in regulatory and supervisory activities. The Department has kept no account of such expense and it is impossible to ascertain it, even if the omission of the law itself to protect the corporations' constitutional rights could be cured by the voluntary action of the Department. Compare L. & N. R. vs. Central Stockyards, 212 U. S. 132. The defendant has utterly failed to sustain the burden which was upon it to prove that the fees paid by plaintiff were no more than reasonably sufficient to meet the legitimate expenses of supervising and regulating the railroads, including plaintiff. When an alleged regulatory statute directs that regulatory fees shall be devoted to defraying other expenses as well as regulatory expenses, the presumption is that the fees fixed are unreasonable and the burden of establishing the contrary is on the one asserting the validity of the statute. Hugo vs. Suazo, 59 Fed. (2d) 386.

III

The court is of opinion and concludes that Chapter 107, Laws of 1929, offends against Section 8, Article I, and the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States and Article I, [fol. 63] Sections 3 and 12 and Article VII, Sections 1, 2 and 3 of the State Constitution, as amended, and is void.

IV

Let judgment be entered that plaintiff recover the amount paid to the Department of Public Works under Chapter 107, Laws 1929 over and above the fees due the state under Chapter 107, Laws 1923 and Chapter 227, Laws 1929, together with interest at the legal rate from the respective

dates of payment, making a total judgment in the sum of Twenty-five Thousand, Four Hundred Sixty-six 47/100 ($25,466.47) Dollars, all as shown in Finding of Fact No. V, together with costs to be taxed.

Dated the 1st day of April, 1935.

D. F. Wright, Judge.

[fol. 64] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

GREAT NORTHERN RAILWAY COMPANY, a Corporation
Plaintiff,

vs.

STATE OF WASHINGTON, Defendant

JUDGMENT—Filed April 1, 1935

This cause came on regularly for hearing on this 1st day of April, 1935 on motion of the plaintiff for the entry of judgment, the plaintiff appearing by its attorneys, Thomas Balmer and Edwin C. Matthias and the defendant appearing by G. W. Hamilton, Attorney General and George G. Hannan, Assistant Attorney General, and the court having heretofore made and entered its findings of fact and conclusions of law, and the court being fully advised in the premises,

It is Ordered, Adjudged and Decreed that the plaintiff have and recover from the defendant the sum of Twenty-five Thousand Four Hundred Sixty-six and 47/100 ($25,466.47) Dollars, together with its costs herein taxed in the sum of $21.00 consisting of clerk's fees amounting to $11.00 and statutory attorney's fees $10.00, making a total judgment in favor of plaintiff and against the defendant in the sum of Twenty-five Thousand, Four Hundred Eighty-seven 47/100 ($25,487.47) Dollars.

Done in open court this 1st day of April, 1935.

D. F. Wright, Judge.

[fols. 65-67] [File endorsements omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Titles omitted]

Statement of Facts—Filed May 17, 1935

Before the Honorable D. F. Wright, Judge Presiding

[fol. 68] Be it remembered, that the above entitled causes came on regularly for hearing before the Honorable D. F. Wright, one of the judges of the above entitled court, sitting in Department No. 2 of the Superior Court of the State of Washington for Thurston County, at the Thurston County Court House at Olympia, Washington, at the hour of ten o'clock a. m. on Thursday, the 3d day of January, A. D. 1935; the parties herein appearing by their respective attorneys as follows:

The plaintiff, Great Northern Railway Company, by Edwin C. Matthias;

The plaintiff, Northern Pacific Railway Company, by L. B. daPonte;

The plaintiff, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, by O. G. Edwards;

The plaintiff, Oregon-Washington Railroad & Navigation Company, by F. T. Merritt;

The defendant by Geo. G. Hannan, Assistant Attorney General;

Whereupon, the following proceedings were had and testimony taken, to-wit:

COLLOQUY AND OFFERS IN EVIDENCE

Mr. daPonte: If Your Honor please, these four cases, agreed to be tried on the same record, are all alike except the judgments to be entered.

The Court: Of course, the amounts, etc.

Mr. daPonte: Yes. Now I think we are all agreed we will ask that the complaint be amended so the only question is the 1929 Act.

[fol. 69] Mr. Matthias: That is Chapter 107, 1929.

Mr. daPonte: Before that fee would be due under the prior act, I think the Northern Pacific, and I think the Great

Northern, at least the Northern Pacific, would be $1500.00.

Mr. Hannan: I am not stipulating as to that amount.

Mr. daPonte: No, I am sure that is correct, $1500.00, the amount of our fee under the Chapter 107, Laws of 1929. That will simplify the case very considerably.

Mr. Hannan: Then your position is practically to withdraw the allegation of the effect excepting as to the Laws of 1929.

Mr. daPonte: Yes, and only ask for recovery of the fee under that act less the amount that would have been paid under the prior act. Also, so the complaint to the tax, 1929, will be clear, that is an inspection or supervision tax. Since the complaint was filed, the Supreme Court fixed the status of the statute as one levying a supervision or inspection fee. The complaint attacks the Act of 1929 on the theory it might be regarded as a statute levying an occupation or privilege tax, and also as an inspection or supervision fee. Since the complaint was filed, the Supreme Court held the Act of 1929, has held it was an inspection tax.

The Court: That was in the Seattle case, a telephone case. [fol. 70] Mr. daPonte: So the proceedings now should be simple and short.

Mr. Hannan: What do you want with regard to the year 1933?

Mr. daPonte: We made a stipulation in our case that the complaint be read as amended to attack the fee paid about April 1, 1934, and that the pleading, and that your answer shall stand.

Mr. Hannan: We have to dispose of demurrers before the answer is considered. I suppose the demurrer is the same.

Mr. Matthias: I thought it was disposed of.

The Court: I thought so, too.

Mr. Hannan: You misunderstood me. The Court overruled the demurrers to the amended complaints and answers. And now we are bringing in a supplemental answer by stipulation, and they are amended for the succeeding year after the start, which is due April 1, 1934. Now then, we are willing to stipulate that whether amended or not, the complaint will be considered amended and supplemented to cover that year, and the court can rule on the demurrers on that. It would be expected to be the same as others.

Mr. daPonte: This stipulation of ours covers it all about as you said. There is a stipulation that covers our situation.

Mr. Hannan If the Court has no reason, then, to change the ruling on the matter of ruling on the demurrer, then [fol. 71] take up the answer.

Mr. Matthias: If Your Honor please, with respect to the Great Northern case, there is no written stipulation on file with respect to the 1933 fee which was paid March 27, 19— March 29, 1934. That fee was $3,137.05.

As I understand it, the State is willing to stipulate that that fee was paid under protest and that it may be treated as if it was included in these complaints as a separate cause of action with the understanding that if we recover we will be entitled to recover also that fee. If the judgment is in favor of the State, the judgment will be a bar to any further proceedings for the recovery of that fee.

Mr. Hannan: The same situation as the prior years under the other cause of action.

Mr. Matthias: I have a copy of that receipt, the original. If it is satisfactory with you, we will stipulate the amount, $3,137.05. And Mr. Hannan would like to have me introduce the copy of the receipt for payment under protest, so—you have no objection to its being a copy, have you?

Mr. Hannan: No, I have another copy here.

Mr. Matthias: With that understanding, then, I will offer this copy of the receipt, which is a receipt for the payment under protest, dated March 29, 1934, for the 1933 fee.

[fol. 72] (Receipt for payment under protest admitted in evidence and marked Plaintiff Great Northern Railway Company's Exhibit No. 1.)

Mr. Matthias: The record might show that the receipt consists of two pages.

A little out of order, I would like to supplement Mr. daPonte's statement a little. As I understand it, our complaints really attack two laws in 1929, Chapter 107 and Chapter 227, but Chapter 227 did not become material unless these other statutes which we also attack were set aside, which were Chapter 107, Laws of 1923, and Chapter 113, Laws of 1921. Mr. daPonte stated at the opening that we are only attacking Chapter 107 of the Laws of 1929. As I understand the law, since that statute is amendatory of Chapter 107 of the Laws of 1923, should the decision be in our favor, the 1923 statute will be revived, and whatever the fees are under that statute would be the fees we would

have to pay, and therefore we would only be entitled to recover what we sued for less that fee.

In the telephone case, the Supreme Court held that this was a regulatory statute composed of a fee for regulatory purposes to enforce a Public Service Commission law, but [fol. 73] our contention is that as the statute operates it is collecting a larger fee than is required to meet those expenses, and therefore, while declared to be regulatory, it is in fact a revenue measure because it raises more revenues than required for regulation purposes.

Mr. Hannan: If the Court please, before going to introducing testimony, I want at this time to object to the introduction of any testimony on the amended complaint for the reason that they have no capacity to sue. They are suing to recover the fee, the payment of which is required, authorizing them, if at all, to bring the suit, and therefore it is not really a payment, and it all appears under protest. Second, for the reason the complaint does not state facts sufficient to constitute a cause of action. That was argued before Your Honor on demurrer. I may add there, I think it was covered, too, at the argument of the demurrer, there is no order from the Secretary of State with regard to his fixing the amount of the fee, if that applies. I object to any testimony going in under the amended complaint, as I stated at the time of the argument of demurrer, for those reasons.

Mr. Edwards: The amended complaint of the Milwaukee Railroad applies only to and including the year 1932. We [fol. 74] are in the same position of the Great Northern for 1933. I have here the original receipt.

Mr. Hannan: Have you filed a supplemental complaint?

Mr. Edwards: No.

Mr. Hannan: The same stipulation is satisfactory to me, the year 1933 abides by the decision of the Court in the other years so far as your case is concerned, and if against the State, you will recover, and if in favor of the State, you don't recover, for that year as well as the others.

Mr. Edwards: That is satisfactory, and I would like to introduce in evidence a copy of the receipt for that year's fees. I have the original.

Mr. Hannan: I think I have them here, too. I don't remember whether we admitted the amount of those or not.

Mr. Edwards: I would like to introduce this as Milwaukee Exhibit—I think probably it had better be given No. 2.

The Court: Yes.

(Receipt of Chicago, Milwaukee, St. Paul and Pacific Railroad Company admitted in evidence and marked Plaintiff Milwaukee Exhibit No. 2.)

Mr. daPonte: We are ready to go ahead.

Mr. Merritt: If you are through, I want to state, if the Court please, with regard to the Oregon-Washington, I offered a supplemental complaint covering the payment for [fol. 75] the year 1933. Counsel, in his answer, omitted to cover, to answer to that complaint, but it may be understood that the denials of his answer to the causes of action in the amended complaint apply to the supplemental complaint as though it was on that.

Mr. Hannan: I believe there is a stipulation on file in that, that the motion on demurrers applies.

Mr. Merritt: I don't think it applies.

Mr. Hannan: It is the same as his receipt.

Mr. Merritt: You admit our payment, the amount of our payment, and tax paid under protest, so I take it is not necessary to enter the receipt.

Mr. Hannan: What is the amount?

Mr. Merritt: '33 is $712.87.

Mr. Hannan: Have you a copy of the receipt of that?

Mr. Merritt: Yes, I think so.

Mr. daPonte: Your Honor, the Northern Pacific offers in evidence—— (Interrupted.)

Mr. Hannan: Just a minute.

Mr. Merritt: The Oregon-Washington offer in evidence the receipt from the Department of Public Works for the payment made by the Oregon-Washington Railroad & Navigation Company for the year 1933.

The Court: That will be three.

(Receipt of payment of Oregon-Washington Railroad & Navigation Company admitted in evidence and marked Plaintiff Oregon-Washington Exhibit No. 3.)

[fol. 76] Mr. Hannan: The amount is how much?

Mr. Merritt: $712.87.

Mr. daPonte: We will, the Northern Pacific offers a Stipulation on file, dated the 10th day of April, 1934, regarding

payment of the tax for the year 1933, and the tender of protest attached to the stipulation. That is a part of the court file.

(Stipulation, with attached protest, admitted in evidence and marked Plaintiff Northern Pacific Railway Company's Exhibit No. 4.)

Mr. daPonte: Now, Mr. Hannan, I have a similar protest and stipulation for each of the prior years. If there is any question about that, is it necessary to offer those documents?

Mr. Hannan: I don't remember if I denied that in the protest or not.

Mr. Matthias: You admit that in your answer.

Mr. Hannan: What is the matter with you? I was just asking you about it.

Mr. daPonte: There are the protests.

Mr. Hannan: Either put them in or let it go on stipulation.

Mr. daPonte: I would rather not put them in. It may be admitted they were paid as alleged?

Mr. Hannan: Yes, there is no doubt about that.

Mr. Matthias: That goes for all the cases?

Mr. Hannan: Yes.

Mr. daPonte: For all of the defendants, I offer in evi- [fol. 77] dence a copy of the report of the Departmnet of Public Works to the Governor for the year 1933. Let that be marked.

The Court: That will be for all?

Mr. daPonte: Yes.

Mr. Hannan: Are you going to mark that as an exhibit?

(Thirteenth Annual Report of the Department of Public Works of Washington to the Governor admitted in evidence and marked Plaintiffs' Exhibit No. 5.)

Mr. Hannan: Report, 1933?

The Court: Yes.

Mr. Hannan: I object to it as incompetent, irrelevant, and immaterial.

Mr. Matthias: Is that for 1933?

Mr. daPonte: Yes. Plaintiffs offer in evidence the same for the year 1932. That would be exhibit 6, Plaintiffs' Exhibit No. 6.

Mr. Hannan: Same objection.
The Court: It may be admitted.

(Twelfth Annual Report of the Department of Public Works of Washington to the Governor admitted in evidence and marked Plaintiffs' Exhibit No. 6.)

Mr. daPonte: The report to the Governor, the Department's report to the Governor for the year 1931.
The Court: '31.
Mr. Hannan: That is Exhibit 7, is it?
The Court: Seven.

[fol. 78] (Eleventh Annual Report of the Department of Public Works of Washington to the Governor admitted in evidence and marked Plaintiffs' Exhibit No. 7.)

Mr. daPonte: And the Annual Report of the Department to the Governor for the year 1930. This is Exhibit 8.

(Tenth Annual Report of the Department of Public Works of Washington to the Governor admitted in evidence and marked Plaintiffs' Exhibit No. 8.)

Mr. daPonte: And the Department's report to the Governor for the year 1929. That will be Plaintiffs' Exhibit 9.
The Court: Nine.

(Ninth Annual Report of the Department of Public Works of Washington to the Governor admitted in evidence and marked Plaintiffs' Exhibit No. 9.)

Mr. daPonte: I didn't give you that one, did I?
Mr. Hannan: Same objection to all of those.

Mr. daPonte: Your Honor please, the Department's report of the current year, 1935, is about to go to the printer, and I want the offer left open to offer a printed copy when it is printed.

Mr. Hannan: I don't think that is material at all. I make the same objection for the further reason it is subsequent to these things. It doesn't apply. I don't know if the [fol. 79] Court wants to hold the case open anyway.

Mr. daPonte: It probably wouldn't be decided before then anyway. It will be out in a week or two.

The Court: It may go in the record anyway.
Mr. Matthias: That will be 10.

(Said Annual Report of the Department of Public Works of Washington to the Governor to be offered in evidence at at later date as Plaintiffs' Exhibit No. 10.)

Mr. daPonte: I want to read into the record from—I want to read this, Mr. Hannan.

Mr. Hannan: That is the inaugural message? That is immaterial.

Mr. daPonte: I want to read from Page 15 of the Second Inaugural Message of Roland H. Hartley in, January 16, 1929.

Mr. Hannan: I object to that being admitted in evidence. It is incompetent, irrelevant, and immaterial, and furthermore, if anything is put in, it should be the whole report and not a part of it, but the whole report is incompetent, irrelevant, and immaterial.

Mr. daPonte: This is the only portion that bears upon the matter we have here.

Mr. Hannan: It is absolutely immaterial. The statement of the executive hasn't anything to do with it, and I object.

Mr. daPonte: I am not talking about it. You suggested that the whole report go in. If you want it all in——(Interrupted.)

[fol. 80] Mr. Hannan: I don't want any of it in.

Mr. daPonte: I understand your objection. You say the whole document should go in. It would have no bearing on my own theory.

Mr. Hannan: I am not concerned with your theory of it.

Mr. daPonte: I will read this portion into the record. There is no other portion of the document that has any bearing whatever, even under my theory. I see no reason to put this complete document in the record to encumber it.

Mr. Hannan: I object to it going in, and if at all, the whole thing.

The Court: I think you may put it in. I am inclined to agree with Mr. Hannan.

(Second Inaugural Message of Governor Roland H. Hartley to the State Legislature, Twenty-First Session, January 16, 1929, admitted in evidence and marked Plaintiffs' Exhibit No. 11.)

Mr. daPonte: I will read this portion and file the document.

Mr. Hannan: What exhibit is that?
Mr. daPonte: Eleven.

"The cost of operation of the Department of Public Works is now paid from three sources—the general fund, the auto transportation fund, and the public service revolving fund. The motor vehicle division is entirely self-sup-
[fol. 81] porting, all expenses being paid from the auto transportation fund, derived from an assessment of one per cent of the gross earnings of all motor stage and freight lines. The public utilities and transportation divisions should likewise be self-supporting, and as to operating costs, the work of this department carried on as a unit.

"It is recommended that the fees now required of public utilities and transportation companies, other than motor, be sufficiently increased so that the department may carry on all of its activities without cost to the general taxpayer. It is further recommended that the auto transportation and public service revolving funds be abolished, and all receipts paid into the general fund. There is no more justification for setting up special funds in this department than for an insurance fund in the office of the Insurance Commissioner, a banking or savings and loan fund in the Department of Efficiency, or a lawyers', doctors', or barbers' fund in the Department of Licenses."

That is all of his message that deals with the subject here. I ask that be filed as an exhibit if necessary. Page 15 is all we are concerned with, or anybody else.

Mr. Hannan: I object to any part of it going in except as a whole, and as I said before, it is all incompetent, ir-
[fol. 82] relevant, and immaterial.

Mr. daPonte: That is all right. It is all good literature.

The Court: It may be admitted for the purpose of the record. I am inclined to agree with Mr. Hannan it has no relevancy.

Mr. daPonte: In and of itself it has none, of course, but the legislature, as shown, did follow Governor Hartley's mesage in passing this Act of 1929, so if that, it is explanatory statement.

Now, then, there is only one other matter, and it is not in very good shape. Mr. Stookey is here, and I want to prove the number of employees the Department had during the years 1929 to date. Mr. Stookey can take that off and make

a statement of it and put the statement in. That would save a little time.

Mr. Hannan: He is doing that now, I believe, or could do it. I don't know, I am not trying——

(Interrupted.)

Mr. daPonte: Is that satisfactory?

Mr. Hannan: Better put him on.

Mr. daPonte: Take your payroll document, then, and be sworn.

[fol. 83] Mr. C. S. Stookey, being a witness called on behalf of plaintiff, Northern Pacific Railway Company, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. daPonte:

Q. Mr. Stookey, you are the auditor of the Department of Public Works?

A. I am.

Q. You have the pay rolls, have you, of the Department for the years 1929 to date?

A. Yes, sir, I have the transcript.

Q. State approximately the number of employees the Department had in its various divisions for the years 1929 to date. I don't care for the exact number. If it varies from month to month, just state about how it was.

Mr. Hannan: I object to that, your Honor please, as being incompetent, irrelevant, and immaterial. The number on pay rolls in the various departments is immaterial in the matter. I object to the introduction of the testimony.

The Court: It seems to me the objection is well taken. The only thing we are interested in here is whether this amount that is collected is in excess of necessary inspection fees.

Mr. daPonte: No, Your Honor, that isn't the question we have here. We aren't going into that except as shown by the record. Our position is that this is a flat fee levied to pay all of these activities, and that is an invalid act on its [fol. 84] face. It is supplementary to that, and I doubt if it is necessary to my contention, but I thought for reen-

forcing the argument, it would be necessary to show that. I am not going into the cost of regulating railroads. It couldn't be proven. There are no records available.

The Court: All right.

Mr. daPonte:

Q. Just state, Mr. Stookey——

A. I have the total number of employes for each month, but not by sections.

Q. You have kept no records, then, of the number of employes in each of its divisions?

A. Yes, we have a record of that. It isn't divided in divisions. It would have to be picked out.

Q. Your employes devote their time to all of the activities of the Department?

A. That is not a question for me to answer.

Q. For instance, you have no employee who devotes all of his time to steamboats, or railroads, or auto vehicles, or other subdivisions?

A. I think there are, but I wouldn't say positively.

Q. Do you know what they are?

A. I wouldn't care to answer that, no. I am not in a position to.

Q. State the number of employes you have that—you can give the annual average.

A. I will give the annual average. The 1929 average, annual average employes, was 43; 1930 was 40; 1931, 38; [fol. 85] 1932, 42; 1933, 95; and for the first 11 months of 1934, 142.

Q. How is the Department divided, into what kind of divisions? That is, there is a transportation division?

A. Yes, engineering section, transportation section, motor vehicle section, and general office.

Q. Is there a public utility section?

A. Commonly known as the engineering section, yes.

Q. And since the Act of 1929 took effect, as I understand it, the Department's expenses are all paid out of this so-called revolving fund?

A. Yes, since we have no general fund appropriation, and since the auto transportation was incorporated with it, all of it has been from the public service revolving fund.

Q. Made up by the fees paid in by the various utilities, paid in by motor vehicles and automobiles subject to the Department's jurisdiction?

A. Yes, of all those fees.

Q. So the revolving fund is made up of the fees paid under the Statute of 1929, and the statute relating to motor vehicles, etc.?

A. Yes, all statutes which provide for fees to be paid the Department. Of course, we have miscellaneous fees and various kinds.

Q. All of the Department's expenses are paid, indiscriminately, out of this revolving fund?

A. Yes, that appropriation.

Q. How many different fees are paid into the Department, Mr. Stookey? That is, how many different sources? [fol. 85-a] A. If I would be allowed to get a book over there——

Q. Do you want a report?

A. Have you the late report?

Q. 1933, here.

A. You want me just to say how many different classes of fees?

Q. Yes, and what they are.

A. Well, the certified auto transportation.

Mr. Hannan: What is the document being used now?

Mr. daPonte: 1933 Annual report.

Mr. Hannan: One of those put in?

Mr. daPonte: Yes.

Mr. Hannan: Where?

A. Last page.

Mr. daPonte: There is a financial statement at the last of each of these reports.

A. Certified auto transportation companies pay two kinds of fees, gross revenue fees and application fees, and we have the annual report filing fees. The new permit law pays three classes of fees, gross revenue fees, application fees, and plate fees. Storage warehouses pay two classes of fees, gross revenue and application fees. We have scale test fees. We did have utility overcharge fees. That is no longer a law.

Q. Repealed that statute?

A. Yes.

Q. That was the amount of ten per cent the Department charged for deducting reparation charges and making orders of reparation against defendants, and they got ten per cent of the amount awarded?

[fol. 86] A. That is correct. We have miscellaneous fees of various kinds which I will group together. Certified boat fees includes gross revenue and application fees. And then we have the assessment of special case costs.

Q. That is under this last statute? It is proposed to assess the cost of the Department's investigations against the utility being investigated?

A. Yes, sir.

Q. That doesn't apply to railroads?

A. It doesn't so far, I don't believe.

Q. It isn't considered to be?

A. I don't know.

Mr. Hannan: I think that is a matter of law.

Mr. daPonte:

Q. This auto vehicle fee, do you keep a separate account of the receipts and disbursements chargeable to the auto vehicles?

A. Yes, sir.

Q. You are able to tell what the cost of their regulation or supervision by the Department was for any year?

A. Well, I wouldn't say for any year, no. There was a while in there we didn't keep those costs. It is really supplemental to the bookkeeping system and has never been required.

Q. What year do you have that for? Have you ever kept them?

A. Yes, I have it there. I would have to get my papers.

Q. Do you know what the amount is?

A. Yes, I have the amount.

Q. Don't you, under the statute which requires it, keep an account of the regulating and supervising of these auto [fol. 87] vehicles so the amount will be neither more nor less than the amount of the cost?

A. No, that clause has been amended.

Q. It is amended now?

A. Yes.

Q. When?

A. I think Chapter 166.

Q. That is the 1933 Legislature?

A. Yes.

Q. Prior to that time, did you keep that record?

A. Yes, I kept some record. I am not sure I have it there now.

Q. Have you the cost of regulating steamboats in comparison to the fees they pay?

A. Yes, sir.

Q. Have you kept that separately?

A. Yes, I did.

Q. In this report you referred to, these fees, which item includes the railroad fees?

A. That is the report filing fees.

Q. This is the report of the railroads?

A. That is all annual reports filed; that is one-tenth of one percent.

Mr. Matthias: That includes the gross revenue fee we are seeking to recover here?

A. Yes, sir.

Mr. daPonte:

Q. These filing fees are put in by, or paid by, the railroads and the utilities, and the utility companies include the telephone companies, water companies, gas companies, [fol. 88] power companies——

A. That is correct.

Q. They are described in the statute: And that fund is one consolidated fund, is it not?

A. The fee is the same covering all of them, one-tenth of one percent.

Q. You use that fee paid in by all of them, providing for the cost of supervision of the railroad companies and these utility companies, that is the way you run it?

A. It is all put in the same fund and drawn out in the same fund.

Q. No account is kept, for instance, of power companies, of their cost of regulation?

A. I have figures on it, yes.

Q. It is figures you made for yourself?

A. Yes, it is not required by law.

Q. The same is true of the railroad companies and telephone companies?

A. Yes.

Q. Did you make any distinction between the cost of various kinds of activities which the Department carries on in relation to railroads? That is, did you keep any account of the cost of rate hearings as distinguished from the cost of these reparation costs?

A. No

Q. In other words, to make a long story short, you made no distinction in your accounts between the cost of any of the various activities of the Department in relation to railroads, but lumped them all together as part of the expense?

[fol. 89] A. If it was a railroad charge, I considered it a railroad charge and didn't consider the nature of it, whether it was a rate hearing, an I. C. C. case or——

Q. You made no attempt to ascertain the cost of litigation the Department is carying on before the Interstate Commerce Commission of late years?

A. No.

Q. It has participated in the cases before the Commission, hasn't it?

A. Yes, sir.

Q. Those were expensive proceedings, going on for many years?

Mr. Hannan: I am——

A. I know there has been a bunch. Docket 17,000.

Mr. daPonte:

Q. It has been going on for a number of years?

A. Yes.

Q. Mr. Stookey, you didn't finish giving—— Yes, you gave us the employes for the various years, didn't you?

A. Yes.

Mr. daPonte: That will be all of the plaintiff's with the understanding that when the 1934 reports are in, we can file that.

[fol. 90] Cross-examination.

By Mr. Hannan:

Q. Mr. Stookey, Docket 17,000 was a railroad case, wasn't it, involving railroad fees?
A. Yes, I always assumed it was a railroad case.

Mr. daPonte: It was.

Mr. Hannan:

Q. What do you mean by reparation cases? I believe you testified on direct there were some reparation cases.

Mr. daPonte: I agree with you those reparation cases were brought to recover refund on excessive charges.
Mr. Hannan: And those involved railroads, also.
Mr. daPonte: Yes.

A. You mean the overhead charge a mile.

Mr. Hannan:

Q. You say they paid alike, one-tenth of one per cent? That isn't the same for certain holders, is it?
A. No, they pay one percent.

Mr. Hannan: That is all.

(Witness excused.)

Offer in Evidence

Mr. Matthias: I want to offer, then, as Exhibit 12, a statement of—prepared by the Tax Commission, sent to me by Mr. Hannan, showing the miles of track operated by the Great Northern; revenues; amount of stock authorized, both system and interstate and intrastate; and the actual value and equalized value for ad valorem tax pur-
[fol. 91] poses as fixed by the State, for all the years mentioned.

The Court: That will be 12.

(Statement admitted in evidence and marked Plaintiff Great Northern Exhibit No. 12.)

Mr. Matthias: Mr. Hannan, I find you, and I believe inadvertently, denied we had in all of the years paid the license fees required by law entitling us to sue. Since those are the fees we are suing on, they must have been paid.

Mr. Hannan: It is. The complainant shows they paid all these under protest. They paid nothing through the Secretary of State. They paid it all to the Department of Public Works because it exceeded the Secretary of State fees.

Mr. Matthias: I see.

Mr. daPonte: That would be straightened out now, wouldn't it, since we waived the rights under the other laws. The $1500 would exceed the amount payable to the Secretary of State substantially for us.

Mr. Matthias: I think that is all.

Mr. daPonte: We have rested.

Mr. Hannan: The defendant rests, also.

Mr. Matthias: I think before the record is closed it ought to be understood for future purposes that these four cases are all consolidated, both for the purposes of trial and appeal, will they be, because we have one set of exhibits [fol. 92] here and can't very well get out of it.

Mr. daPonte: One transcript of testimony, and one record of appeal, and one clerk's transcript, if either party has to appeal it.

Mr. Hannan: Separate notices of appeal.

Mr. daPonte: Separate notices of appeal, and separate appeal bonds, but only one clerk's transcript and one stenographer's transcript—one statement of facts, and separate clerk's transcript.

(Whereupon, the case was formally closed.)

(At 2:15 p. m. on Thursday, January 3, 1935, the above entitled cases were reopened for the introduction of further testimony, and the following proceedings were had and testimony taken, to-wit:)

Mr. Hannan: Your Honor, at the reopening of the case, Your Honor ruled to permit me to introduce some testimony in defense. I call Mr. Stookey to the stand.

MR. C. S. STOOKEY, being a witness called on behalf of defendant, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Hannan:

Q. You are the auditor of the Department of Public Works?

[fol. 93] A. I am.

Q. You are the man who testified for the plaintiffs here in this cause?

A. Yes, sir.

Q. How long have you been auditor of the Department?

A. Since June, 1920.

Q. Mr. Stookey, have you made an examination of the records of the Department for the years 1929, 1930, 1931, and 1932, and '33, in regard to the railroads?

A. Yes, sir.

Q. Have you made a computation as to how much the railroads have paid in those years and how much has been expended by the Department on the railroad part of the Department of Public Works?

A. Yes, sir.

Q. Tell us what they are by years.

A. Receipts, 1929 calendar year from the railroads, $30,640.12, and expenses chargeable to railroads for the fiscal year April 1, 1929 to March 31, 1930, were $34,284.60. Receipts—— (Interrupted.)

Q. 1930?

A. Calendar year 1930, $25,788.12; disbursements, 1930 fiscal year, $43,795.28. Receipts for 1931 calendar year, $19,953.57; disbursements for the 1931 fiscal year, $27,101.61. Receipts for the 1932 calendar year, $12,921.52; disbursements for the 1932 fiscal year, $24,856.90. Receipts for the 1933 calendar year, $12,247.58; disbursements for the 1933 fiscal year, $9,245.66.

Q. Have you the total for all that?

A. I have the accumulative excess of disbursements over [fol. 94] receipts for that period.

Q. How much is it?

A. Which amounts to $37,833.14.

Q. Do your charges for disbursements include anything

for legal services of the Attorney General's Office in regulating the railroads, or any of those other departments?

A. No, sir, just for funds expended from our appropriations.

Q. Did you consider anything for the consideration of the State Treasurer or State Auditor in regard to those funds in state regulation?

A. No, sir.

Q. Did you include anything for the auditing of the Department's books by the Department of Efficiency auditor?

A. No, sir.

Q. You got your figures from the books of the company?

A. The Department of Public Works.

Cross-examination.

By Mr. daPonte:

Q. When did you make these figures?

A. I started making the figures around 1924; however, these are later figures. These figures I have compiled, the latter part of them, within the last month I should judge.

Q. These accounts were not kept currently from year to year?

A. Yes, I had them in the files in case I needed them.

Q. Why did you make them?

A. Originally, I made them before the one-tenth of one per cent law went in, to see about how the expenses were [fol. 95] running between the various classes of utilities.

Q. Who furnished you the figures from which you made these compilations?

A. As to salaries, they were furnished by each individual. Each month, an individual turns in a slip to me prorating his salary for the month to each class.

Q. Something he did himself?

A. Yes.

Q. For himself?

A. Yes.

Q. Do you know whether he correctly pro-rated them or not?

A. No.

Q. It was no part of his official duties to make a prorata?

A. No, it was a request by me, and I checked to see they were turned in each month.

Q. Those figures were not required by any law to be kept?

A. No, not even by the Department.

Q. Just some private memoranda you kept for your information?

A. For the information of the Department if it should ever be needed.

Q. What use would the Department have for them?

A. For just such a case as this, is likely to come up at any time.

Q. It was not of use on this class?

A. We had to keep it on motor vehicles and boats, and kept it for this, too.

Q. Because we had a statute on motor vehicles and boats that provided the tax be regulated by costs?

A. Yes.

Q. There was no such statute for railroads or utility [fol. 96] companies?

A. No.

Q. They are not official in the sense of any rule, or order or rule of the Department that required them to be kept?

A. No.

Q. They are based on the proration of time handed in to you by the various employes of the Department?

A. Yes.

Mr. daPonte: I move to strike the witness's testimony. It is based on hearsay. It was no part of his duty to keep these figures, and no part of the duty of the men from whom he obtained the figures to keep them. It is his own private memoranda, kept out of curiosity, apparently, by Mr. Stookey, not official figures at all.

Redirect examination.

By Mr. Hannan:

Q. Were that compilation and figures kept in the Department's files?

A. Yes, sir.

Q. You did that on the Department's time under your salary as Auditor?

A. Yes, sir.

Q. They have always been at the disposal of the Department?

A. Yes, sir.

Q. You started to keep them for the benefit of the Department in determining the one-tenth of one per cent law?

A. Yes, sir.

[fol. 97] Q. As to how much tax?

A. Yes, sir.

Q. And continued keeping them?

A. Yes.

Mr. daPonte: You say you started before there was any one-tenth of one per cent tax?

A. Yes.

Mr. Hannan:

Q. You were never ordered to discontinue?

A. No, sir. We have had various directors since then.

Q. Invariably the employes handed this information to you?

Mr. daPonte: Don't lead your witness. My objection is—— (Interrupted.)

Mr. Hannan: I withdraw the question.

Q. Mr. Stookey, who handed in the information to you that you compiled this record from?

Mr. daPonte: That has been gone over. I think we understand it.

Mr. Hannan: It won't hurt you, then.

A. This material was handed in by each employe.

Q. What do you mean by employe?

A. Anyone on the Department payroll was supposed to hand me one each month.

Q. Did it include the supervisors?

A. The supervisors, but not the directors.

Mr. daPonte: I would like to have Mr. Stookey produce the slips from which he made—— (Interrupted.)

A. What do you want?

Mr. daPonte: I want the memoranda produced from [fol. 98] which you made the figures you just testified to.

A. We would have to move the entire office up here.

Mr. daPonte: I don't think you would have to do that.
Mr. Hannan: I think certified copies are usual.

A. I have several files these are drawn from. These are my working figures from the sheets turned in by the employes. These are open for inspection.

Recross-examination.

By Mr. daPonte:

Q. You have no knowledge of your own whether the figures turned in by the employees are correct or not?

A. No.

Q. He just told you at the end of the month what proportion of his time he was engaged in working on a railroad matter or some other matter?

A. He don't tell me. He made out a statement signed, under his signature.

Q. How did it read? One-third, or one-fourth of my time?

A. I have here one of the forms used.

Q. Let's see that. Now—— (Interrupted.)

A. I might state that over to the double line is a complete report in itself; to the right of the double line is for special cases. That is where one class of utilities possibly has several special cases an employe works on during the month.

Q. I notice here, according to your compilation, you have received from railroads $25,000, and expenses, disbursements chargeable to railroads, $43,000.

A. That is correct.

[fol. 98a] Q. Where did you get the money to pay the $43,000, that excess?

A. Out of the Public Service Revolving Fund.

Q. You took that from somebody else?

A. It is all in the same pot. It can't come out even.

Q. It was never calculated with the cost of regulating any particular class of utility?

A. Yes, sir, that is what it is for.

Q. Who calculated them on that?

A. I did.

Q. According to that, all cost the same, one-tenth of one percent of the gross income. How do you explain that?

A. It is not up to me to explain it. That is the figures here, and that is the law passed.

Q. That is a remarkable coincidence that the fee was fixed.

A. That is about the best average.

Q. Each and every one stands one-tenth of one percent?

A. No, my figures didn't say that.

Q. This fee never was fixed with reference to cost, was it, and couldn't be?

A. All I can say is—— (Interrupted.)

Q. Answer the question.

Mr. Hannan: I object to that as a conclusion, and incompetent, irrelevant, and immaterial, and not a proper question.

Mr. daPonte:

Q. You said you did the work, and are you telling us the—are you trying to tell us this tenth of one percent was ever fixed with reference to the cost of supervising and regulating these respective utilities?

[fol. 99] A. It was fixed by the legislature. I can't understand that question.

Q. Do you know what that means?

A. No.

Q. Was this fee fixed by you, as far as you know, Mr. Stookey, at a time that would approximate the cost of regulating and supervising by the Department, these various classes of utilities? You understand that, don't you?

A. No, I don't understand your question.

Q. You really don't?

A. No, I can't figure it out.

Q. Do you speak English?

A. Sometimes.

Q. I will ask you again, was the amount of this fee paid by the railroads and other utilities calculated in order to be approximately equal to the cost of supervising and regulating each class of corporation?

A. That was the idea, yes.

Q. Whose idea was that?

A. The idea of the legislature, I take it.

Q. I am talking about as far as you know.

A. I only know what work I have done on it.

Q. Did you turn in to the legislature, or anybody else, any figures to show that at that time it would cost a tenth of one percent of the gross income?

A. I didn't have anything to do with that. That was up to the director.

Q. So you turned in some figures, and someone else made calculations of what the percentage of gross income should be?

[fol. 100] A. Yes.

Q. You know the expenses vary greatly from year to year?

A. Yes.

Q. There is no provision and no record to adjust the cost yearly, to adjust the fee?

A. The fee is a flat one tenth—— (Interrupted)

Q. And it all goes into one fund?

A. Yes.

Q. No matter what the cost of regulating railroads is, you are going to pay the entire amount, whether more or less, out of one pot?

A. Yes.

Q. Now, have you any figures to show what was the cost of the Department's proceedings, litigant before the Interstate Commerce Commission, as to railroad matters?

A. I have never compiled that.

Q. Never kept any records on that?

A. The original records on the vouchers is all.

Q. This time turned in by the employes took no account of the kind of work they were doing as to the regulation of railroads?

A. No, only as to special cases.

Q. If it was a special case, there was a note as to what it was?

A. Yes, sir.

Q. Those expenses are all in the figures charged to railroads?

A. Yes, sir.

Q. Which one of these utilities has a surplus to its credit? You say the railroad has a surplus against it, an overrun; [fol. 101] which one has a surplus to its credit?

A. I don't know. All I picked out was the railroads. I have the rest of them here.

Q. You have never made a balanced figure showing this class, say telephones, has so much to its credit, and railroads has so much in the red, or anything like that?

A. No, I haven't that available.

Q. It just happened you made up the figures for railroads?

A. Yes, sir.

Q. Because this suit was brought?

A. Correct.

Q. If some other utility brings a suit, you will concoct these figures?

A. Out of the records, not out of my head.

Q. You would produce some figures?

A. I would make them up to date.

Q. So the Department is prepared to furnish some figures to show any one of the utilities costs more than they have paid in?

A. After all, the figures have to balance, you know.

Q. You have never balanced them?

A. I can balance them.

Q. How long would it take you?

A. Two or three days at least.

Q. That is just the records. They are not kept currently?

A. No.

Q. Now, let's take the payroll here for the year 1933. Have you got that with you?

A. I left it down there.

Q. Let's see any month, the month of June, 1933, for in-
[fol. 102] stance, would do. Before we get to that, was it your idea that this— Did you keep these figures with the idea that this statute would be invalid unless it was limited to the cost of regulating railroads?

A. No, sir.

Q. I can't see then, what interest it was to you to keep it up since the law of 1929 was passed.

A. One reason was because the railroads have been contesting the fees for the last four or five years.

Q. Why for the telephone companies? They haven't contested the fees.

A. I am not positive. Someone did.

Q. You kept it for companies whether protested or not?

A. Yes, sir.

Q. You didn't keep it for railroads because they protested, did you?

A. Not necessarily, some others might at any time.

Q. In other words, you thought they might have room for protest?

A. We have to be ready whether they protest or not. Do you want June, 1933?

Q. Yes. How many employes are listed on here, 1933?

A. 102.

Q. How many on there have anything to do with railroads?

A. Do you want me to name them off?

Q. No, how many in number. You can give the names if you want to.

A. The director is interested in railroads, naturally, being director.

Q. Along with everybody else.

[fol. 103] A. And naturally, the supervisor of transportation, Mr. Lane.

Q. That is in connection with railroads and everybody else. How many of these were exclusively connected with railroads?

A. I wouldn't say any were exclusively connected with railroads.

Q. How many of those the greatest part of the time is connected with railroads?

A. Mr. Lonergan.

Q. He is chief of transportation?

A. Yes, sir.

Q. He has under his jurisdiction all transportation companies?

A. I presume so. I wouldn't say.

Q. You have given some figures here. He has to do with the stages and trucks, doesn't he?

A. I presume he has something to do with them, yes.

Q. He turned in the slips to you, didn't he? He turned the slips in to you? He has duties in relation to them?

A. Yes, sir.

Q. And has duties in relation to steamboat companies?

A. Yes, sir.

Q. And all transportation companies?

A. I think so.

Q. He has charge of the Interstate Commerce Commission, doesn't he?

A. He has turned in several charges against it.

Q. Isn't it a fact in the last year, Mr. Lonergan hasn't devoted ten percent of his time to the railroad companies? [fol. 104] A. No.

Q. He has been with stages and trucks most of the time?

A. I don't think so.

Q. Where are your records for 1933?

A. I would have to get his compilation and slips for 1933.

Q. How much charged against railroads is Lonergan's salary in the figure you turned in?

A. I don't know. I would have to produce the sheets.

Q. Could you go and get your sheets for 1933 and show how you computed that figure?

A. Yes, sir.

Q. Will you do that?

A. Yes, sir. The year 1933?

Q. Take the year 1933 and show what that includes.

A. I can show you the salary charges. Do you want the expenses, too?

Q. You have turned in some figures here.

A. I couldn't move the whole office up here.

COLLOQUY

Mr. daPonte: I think we should have that, Your Honor. These lack official standing, and if Your Honor rules they are admissible, I want to show what the witness is proper to charge and what is not. What charges were made are left to the discretion either of some clerk or employe who assigns his time to suit himself, and whether he decided the question rightly or wrongly is a matter Your Honor would have to decide. That is why I say this is all extra-official. It has done nothing but satisfied the curiosity of Mr. [fol. 105] Stookey if somebody delved into it. But if that is a material question, it should be decided, and I would like to examine into what the charges are.

The Court: I might express my view. So far as this court is concerned, it is not material, but if you want it in the record—— (Interrupted)

Mr. daPonte: No, I don't want it in. It would be impossible for a clerk to determine the question of law as to what

were proper expenses to be charged to this or that corporation, and there is no check or order on him to distribute around him. If that was true, none of the utilities, if they had double the amount of money each particular class spent, when they brought suit would be found in the red.

Mr. Hannan: Is that Your Honor's idea, that it was not material, any of this testimony of Mr. Stookey, testified to, was not material in the matter?

The Court: It is my view that this whole matter is purely a question of law.

Mr. Hannan: It is mine, too, but they went into the fact.

The Court: It was my suggestion. I didn't want the case to come back here.

Mr. daPonte: We didn't put in testimony of the amount of fees of the railroad, or the charges against them.

[fol. 106] Mr. Hannan: The amount of the fees and the amount of the surplus, and we have a right to—it is the right of the Department to testify to the particular part of it if this is admissible.

Mr. daPonte: My contention is that the law is invalid on its face, is the point I made, and I didn't go into the cost of operating railroads, or the way it is distributed, or the expense.

That is all, Mr. Stookey.

I am satisfied with the ruling.

Mr. Hannan: I take an exception.

(Witness excused.)

Mr. Hannan: That is all the testimony we have.

Mr. daPonte: We have no further testimony.

(Whereupon, the cases were closed and no further testimony was taken.)

[fol. 107] (At the hour of 10:30 a. m. on Monday, the 1st day of April, A. D. 1935, the above entitled cases were reopened and the following proceedings were had in accordance with stipulation between counsel and ruling of the Court during the procedings on January 3, 1935, as recorded on page 14 of this statement:)

OFFER IN EVIDENCE

Mr. daPonte: According to the stipulation of counsel and leave of the Court, Plaintiff files printed copy of the Four-

teenth Annual Report of the Department to the Governor, being the report for the year ending November 30, 1934.

Mr. Hannan: As in the consolidated cases.

(Fourteenth Annual Report of the Department of Public Works to the Governor admitted in evidence and marked Plaintiffs' Exhibit No. 13.)

(Whereupon, the cases were closed and no further proceedings were had or testimony taken.)

[fol. 108] IN SUPERIOR COURT OF THURSTON COUNTY

ORDER SETTLING STATEMENT OF FACTS

On this 17th day of June A. D., 1935, pursuant to due notice of application for settlement and certification of the Statement of Facts in the foregoing entitled action, the undersigned, Honorable D. F. Wright, Judge of said court presiding at the trial of said action, now hereby settles the annexed and foregoing Statement of Facts as the Statement of Facts in the said action and hereby certifies:

That the matters and proceedings embodied in the annexed and foregoing Statement of Facts, exhibits and other written evidence introduced and offered in evidence upon the trial of said action, and filed in said cause and now marked and identified by me as follows: Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 13; referred to and identified in the foregoing proposed Statement of Facts, are matters and proceednigs occurring in said cause, and the same are hereby made a part of the record therein; and that the same contain all the testimony on which said cause was tried; evidence produced or offered by either of the parties to said action, together with all of the objections and exceptions of counsel, taken to the reception or rejection of testimony, and the rulings of the Court therein, all documents and instruments in writing introduced or offered in evidence, and all the material facts, matters and proceedings heretofore occurring in said cause, and not already a part therein; and the Clerk is hereby ordered to attach to the said Statement all of the said original ex-

hibits on file in said cause as herein identified, and which the Clerk of this court is ordered to transmit to the Clerk of the Supreme Court.

Done in open court this 17th day of June, A. D. 1935.

D. F. Wright, Judge.

O. K. —— ——, Attorneys for ——.

[fol. 109] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed April 29, 1935

To Great Northern Railway Company herein and to Thomas Balmer and Edwin C. Matthias, your attorneys of record in the above entitled cause:

You and each of you, are hereby notified that the defendant has appealed and hereby does appeal to the supreme court of the State of Washington from the judgment in favor of the plaintiff heretofore, herein rendered and entered by the superior court of the State of Washington for Thurston County on the 1st day of April, 1935 and from each and every part and parcel of said judgment and the whole thereof.

Dated this — day of April, 1935.

G. W. Hamilton, Attorney General; Geo. G. Hannan, Assistant Attorney General, Attorneys for Defendant.

Service of the above and foregoing notice and receipt of copy thereof is hereby admitted this 27th day of April, 1935.

Thomas Balmer, Edwin C. Matthias, Attorneys for the Plaintiff.

[fol. 110] IN SUPREME COURT OF WASHINGTON

No. 25732. Department One

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Respondent,

v.

THE STATE OF WASHINGTON, Appellant

OPINION—Filed Dec. 12, 1935

This is an action to recover an alleged excess of fees exacted by the state and paid under protest by the plaintiff to the department of public works. Upon a trial by the court, findings of fact and conclusions of law were made, based upon which the court entered judgment for plaintiff. The state has appealed.

At its 1929 session, the legislature enacted chapter 107, Laws of 1929, p. 209 (amending Sec. 1 of Chapter 113, Laws of 1921, p. 354, as amended by Sec. 1, Chapter 107, Laws of 1923, p. 290). The 1929 act, which is in question here, consists of one section and reads as follows:

"That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under sections 10361-1 and 10361-2, shall, on or before the first day of April of each year, file with the department of public works a statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue: Provided, That the fee so paid shall in no case be less than ten dollars." Rem. Rev. Stat., Sec. 10417 (P. C. Sec. 5637-1).

[fol. 111] Section 2 of chapter 113, Laws of 1921, p. 354, Rem. Rev. Stat., Sec. 10418 (P. C. Sec. 5637-2), which must be read in connection with the 1929 act, provides that such fees, when collected, shall be paid to the state treasurer and by him deposited in a fund known as the public service revolving fund.

Respondent paid the required fees annually as they became due, but under protest, claiming that the 1929 act, above set forth, was void. This action was begun in March, 1933, to recover the fees paid for the years 1929 to 1932, inclusive, less the amounts admittedly due for those years under other applicable statutes, namely, chapter 107, Laws of 1923, p. 290, Rem. 1927 Sup., Sec. 10417, and chapter 227, Laws of 1929, p. 631, Rem. Rev. Stat., Sec. 3636-1 to 3636-8, inclusive. By stipulation of the parties made during the course of the trial, the complaint was amended to cover the alleged excess of the 1933 fee, which had also been paid under protest.

The court held the 1929 act to be unconstitutional on its face. For the purpose of the record, however, the court admitted evidence tending to show the operative effect of the act, and from such evidence found and concluded that the fees collected by the department were unreasonable and bore no just relation to the cost of regulation and inspection of railroads. Upon these two grounds, the court entered judgment for recovery of the excess amounts of the fees paid. Two questions are thus presented to us for determination: (1) Whether the act is unconstitutional on its face, and (2) whether it is invalid because of its operative effect.

Respondent's main contention is that the act is void on its face, (1) because the fee, or tax, is not imposed for, nor [fol. 112] limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation, in general, but also the expenses of any and all duties and activities of the department, whether regulatory, administrative, police, or judicial. It is contended that because of its unlimited scope, as thus challenged, the act contravenes the fourteenth amendment of the constitution of the United States and also the fourteenth amendment of the constitution of the state of Washington.

The act appears upon its face to be a regulatory one, and this court has recently declared it to be such. Pacific Tel.

& Tel. Co. v. Seattle, 172 Wash. 649, 21 P. (2d) 721, affirmed in 291 U. S. 300, 54 St. Ct. 383, 78 L. Ed. 810. In that case it was also held by this court that the fund created by chapter 113, Laws of 1921, p. 354, Sec. 2, Rem. Rev. Stat., Sec. 10418 (P. C. Sec. 5637-2), supra, was solely for the purpose of defraying the expenses attendant upon the administration of the public service commission law. So we begin with the understanding that the act in question is intrinsically a regulatory one.

In considering the question of the constitutionality of a legislative act, two principles, well settled in this state, must be kept in mind. The first is this: The courts will presume that an act regularly passed by the legislature is a valid law, and they will not declare it unconstitutional unless it is clearly shown to be so. State v. Bowen & Co., 86 Wash. 23, 149 Pac. 330; Litchman v. Shannon, 90 Wash. 186, 155 Pac. 783; State ex rel. State Reclamation Board v. [fol. 113] Clausen, 110 Wash. 525, 188 Pac. 538; State ex rel. Carroll v. Superior Court, 113 Wash. 54, 193 Pac. 236.

The other principle is this: The courts will not take evidence as to the unconstitutionality of a legislative act, but will determine its constitutionality or unconstitutionality from matters that appear on the face of the act itself or from facts of which the courts may take judicial notice. Barker v. State Fish Commission, 88 Wash. 73, 152 Pac. 537; State ex rel. Govan v. Clausen, 108 Wash. 133, 183 Pac. 115; State ex rel. Trenholm v. Yelle, 174 Wash. 547, 25 P. (2d) 369; Ajax v. Gregory, 177 Wash. 465, 32 P. (2d) 560.

Nothing appears on the face of the act under consideration to indicate, or even suggest, that it is unconstitutional, and there are no facts, supplied by judicial notice, to give it that effect. The act imposes upon all utilities subject to regulation, with two exceptions, a fee, or tax, of one-tenth of one per cent of their gross operating revenues, the fees to be paid into the public service revolving fund. The two classes of excepted utilities are dealt with in other statutes similar in nature. Auto transportation companies pay into the revolving fund a fee, or tax, of one per cent of their gross operating revenues. Rem. Rev. Stat., Sec. 6395 (P. C. Sec. 234-11). Steamboat companies pay into the same fund a fee, or tax, of not to exceed one-fifth of one per cent of the amount of their gross operating revenues. Rem. Rev. Stat., Sec. 10361-2 (P. C. Sec. 5552-2).

The purpose of the present act being, in our opinion, apparent on its face as one of regulation, and having been so judicially declared, it must be presumed that the legislature was in possession of advisory facts on which it proceeded when passing the act. It must further be presumed that from the information possessed by it the legislature [fol. 114] concluded that the amount of the fees, as determined by the prescribed rates of percentage, was reasonably necessary to meet the cost of supervising and regulating the respective utilities. We are convinced that the act cannot be declared to be unconstitutional on its face or from facts of which the court can take judicial notice.

Respondent's second contention is that the invalidity of the act was established by the evidence produced upon the trial. Respondent's contention upon this phase of the case, as we understand it, is that evidence is admissible, not so much for the purpose of showing that an act is unconstitutional in its inception, or upon its face, but, rather, to show that the act has become invalid because of its intentional result or by its operative effect. There is eminent authority supporting the principle upon which that contention is based. Foote & Co. v. Stanley, 232 U. S. 494, 34 S. Ct. 377, 58 L. Ed. 698; Pure Oil Co. v. Minnesota, 248 U. S. 158, 39 S. Ct. 35, 63 L. Ed. 180; Standard Oil Co. v. Graves, 249 U. S. 389, 39 S. Ct. 320, 63 L. Ed. 662; Appalachian Coals, Inc. v. United States, 288 U. S. 344, 378, 53 S. Ct. 471, 77 L. Ed. 825; Wofford Oil Co. v. Smith, 263 Fed. 396; Cleveland Refining Co. v. Phipps, 277 Fed. 463; Lugo v. Suazo, 59 Fed. (2d) 386; State v. Bartles Oil Co., 132 Minn. 138, 155 N. W. 1035, L. R. A. 1916D, 193; State v. Standard Oil Co., 100 Neb. 826, 161 N. W. 537; Century Oil Co. v. Dept. of Agriculture, 112 Neb. 73, 198 N. W. 569. It will be found that most of these cases rest upon the commerce clauses of the United States Constitution, Art. I, Secs. 8, 10.

In the Foote case, supra, cited in many of the others, a clear and definite statement of the extent and effect of the principle is given, from which we excerpt a liberal quotation:

"Inspection necessarily involves expense and the power to fix the fee, to cover that expense, is left primary to the [fol. 115] legislature which must exercise discretion in determining the amount to be charged, since it is impossible

to tell exactly how much will be realized under the future operations of any law. Beside, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. If, therefore, the fees exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately on application, because of the presumption that the Legislature will reduce the fees to a proper sum. Red 'C' Oil Co. v. North Carolina, 222 U. S. 380, 393. But when the facts show that what was known to be an unnecessary amount has been levied, or that what has proved to be an unreasonable charge is continued, then, they are obliged to act in the light of those facts and to give effect to the provision of the Constitution prohibiting the collection by a State of more than is necessary for executing its inspection laws. In such inquiry they treat the fees fixed by the Legislature for inspection proper as *prima facie* reasonable and do not enter into any nice calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered. Still, effect must be given to the provision of the Constitution, which, in unusual and emphatic terms, permits the State to collect only what is 'absolutely necessary.' If, therefore, it is shown, that the fees are disproportionate to the service rendered; or, that they include the cost of something beyond legitimate inspection to determine quality and condition, the tax must be declared void because such costs, by necessary operation obstruct the freedom of commerce among the States. (Citing cases)."

But assuming that the principle just adverted to has legal acceptance and that there are instances in which it may properly be applied, we apprehend that this case was not submitted to the court, nor decided by it, upon that theory, and if it was, then we are further convinced that the evidence neither compels nor warrants a finding of invalidity of the act because of the result intended by the legislature or because of the operative effect of the act.

The record reveals that the court, at the conclusion of the trial, was of the view that the question was entirely one of law, and that the evidence, as submitted, was immaterial and irrelevant. That was the position taken by appellant's counsel from the beginning, and respondent's counsel appear to have finally conceded the point. In the progress of the trial, however, the court admitted the evidence for the purpose of completing the record, so to speak, and to obvi- [fol. 116] ate the possible necessity of being required to take evidence later on because of an adverse decision, on appeal, on the question of law. Although the court did make findings based on such evidence, from which certain conclusions were drawn, and upon which the judgment as entered was based, yet, as already stated, the court considered the question as essentially one of law and not one of fact, nor even as one of mixed law and fact. If we should likewise consider the matter as being solely one of law, then what we have already stated would necessarily dispose of this case, on the ground that the 1929 act is not unconstitutional on its face, nor to be declared so from facts of which we may take judicial knowledge.

However, since the record presents the case as one having a factual angle, we shall, for the purpose of the argument, consider that phase of it and express our view thereon.

This is a law action. The material allegations of the complaint were denied by the answer. The burden of proof, therefore, rested on the plaintiff, who is the respondent here. The evidence consisted entirely of documentary records and the testimony of one witness, the auditor of the department of public works. The documentary records consisted almost entirely of the annual reports of the department to the governor. Those reports gave a resume of the activities of the department and the expenses incident thereto. It is true that the reports did not show that the total amount of the expenses incurred was allocated to the respective classes of utilities in proportion to the cost of supervising and regulating each class; on the contrary, so far as is shown by the reports, all expenses of supervising and regulating the utilities, generally, were paid, as required, from the public service revolving fund, into which [fol. 117] the fees collected from the several utilities had been deposited. But the reports did show that a vast amount of supervision and regulation was necessary and

had been done with respect to railroads, as well as the other, and unrelated, utilities. The real controversy, on the question of fact in the case, was whether one-tenth of one per cent of the gross revenues of the railroads, from intrastate commerce, was more than was reasonably necessary to cover the cost and expense of railroad supervision and regulation. From what appears in the reports it could not be said dogmatically that the rate of percentage prescribed by the act was unnecessarily excessive. Indeed, it is contended by the respondent, and so found by the court, that inasmuch as the department was not required by law to keep, and in fact did not keep, an account of the expense of regulating and supervising railroads, separate and apart from the expense of supervising and regulating other public utilities, it was practically impossible at the time of the trial to make any intelligible segregation. But the difficulty attendant upon meeting the burden of proof does not obviate the necessity of it. The burden rested upon and remained with the respondent and did not, because of its difficulty, shift to the appellant. Not having met the burden imposed upon it, the respondent did not make a case for relief.

But, going even beyond that, the auditor testified that for years he had kept an account which showed that the cost of supervising and regulating the railroads of the state far exceeded the amount of the fees imposed upon them by the act. While the account kept by the auditor was not official, in the sense that of itself it was admissible in evidence, yet what the auditor did in that respect qualified him to testify as to the ultimate fact. Without further detailing the evidence, we will say that in our opinion, and in so far as [fol. 118] there was any evidence on the subject, it preponderated against the findings made by the court as to the cost of supervising and regulating railroads.

The mainspring of respondent's contention upon the immediate point is that many of the activities of the department are not supervisory or regulatory in nature but are administrative or judicial in character, and that the utilities cannot be required to pay fees which are used in part to carry on these latter functions. It may be admitted that if taxes, or fees, should be levied to pay for services in no way connected with public utilities, and at the same time such utilities were subjected to direct taxation upon their

properties for such purposes equally with other corporations, while the other corporations were not required to pay the prescribed taxes, or fees, then there would be just ground for complaint of unlawful discrimination against such public utilities. But that is not the case here.

Respondent takes altogether too narrow a view of the scope and purview of a supervisory or regulatory act, such as the one in question. The purpose of the act is not limited to mere inspection of railroad property, but is a much broader and more comprehensive one. Though railroads are private corporations, their uses are public. They exist for the convenience of the people in various kinds of transportation. They are given certain special privileges to be exercised in the interest of the public, and, to guarantee their performance, the railroads, like other public utilities, are made subject to regulation. Such regulation extends not only to matters affecting safety in transportation of passengers and freight, but also to matters affecting adequacy of transportation and reasonableness of rates. In [fol. 119] the very nature and necessity of things such regulation must have a broad field, the extent of which must be determined by legislative discretion. The power of regulation conferred upon the department of public works must be commensurate with the duties to be performed and the purposes to be lawfully effected. When the interests of the public and of individuals or corporations are blended in a service imposed by law, it is a matter of legislative discretion to determine who shall bear the cost and in what proportions. In Charlotte, C. & A. Railroad Co. v. Gibbes, 142 U. S. 386, 12 S. Ct. 255, 35 L. Ed. 1051, the supreme court of the United States, in speaking of a similar situation with reference to railroads, said:

"Being the recipients of special privileges from the State, to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174, 179. That regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortion-

ate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding, under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion. When exercised through commissioners, their services are for the benefit of the railroad corporations as well as of the public. Both are served by the required supervision over the roads and means of transportation, and there would seem to be no sound reason why the compensation of the commissioners in such case should not be met by the corporations, the operation of whose roads and the exercise of whose franchises are supervised. In exacting this there is no encroachment upon the Fourteenth Amendment. Requiring that the burden of a service deemed essential to the public, in consequence of the existence of the corporations and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to the corporations the equal protection of the laws or making unjust discrimination against them."

In the case now before us, the activities of the department [fol. 120] with respect to railroads, were, in our opinion, clearly within the field of proper supervision and regulation.

The judgment is reversed with direction to the trial court to dismiss the action.

Steinert, J.

We concur: Geraghty, J. Tolman, J. Blake, J. Mitchell, J.

[fol. 121] IN SUPREME COURT OF WASHINGTON

No. 25733. Department One

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent,

v.

THE STATE OF WASHINGTON, Appellant

OPINION—Filed Dec. 12, 1935

PER CURIAM:

This case is companion to, and presents the same questions as were presented in, Great Northern Railway Company v. State of Washington, ante p. —. Upon the authority of that case, the judgment in this case is reversed, with direction to the trial court to dismiss the action.

[fol. 122] IN SUPREME COURT OF WASHINGTON

No. 25734. Department One

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY, a Corporation, Respondent,

v.

THE STATE OF WASHINGTON, Appellant

OPINION—Filed Dec. 12, 1935

PER CURIAM:

This case is companion to, and presents the same questions as were presented in, Great Northern Railway Company v. State of Washington, ante p. —. Upon the authority of that case, the judgment in this case is reversed, with direction to the trial court to dismiss the action.

[fol. 123] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

PETITION FOR REHEARING EN BANC—Filed Jan. 4, 1936

The respondent respectfully petitions the court to grant a rehearing and reargument of this case en banc, for the following reasons:

First. The case involves the important federal question whether Chapter 107, Washington Laws of 1929, contravenes the Fourteenth Amendment and Commerce Clause of the Constitution of the United States.

Second. The decision of Department One of this court upon this question is contrary to the decisions of the Supreme Court of the United States.

Third. Since an appeal to the Supreme Court of the United States is intended, due consideration both to that court and this requires the submission of the federal questions involved to the full bench of this court before its opinion becomes final.

In support of this petition respondent respectfully shows:

I

The court on page 547 of the departmental opinion, as reported in Volume 84, Washington Decisions, 545, et seq., correctly states respondent's main contention that the act is void on its face, "(1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee im- [fol. 124] posed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of any and all duties and activities of the department, whether regulatory, administrative, police, or judicial."

The departmental opinion overrules these contentions on the stated ground that nothing appears on the face of the act to indicate that it is unconstitutional, and that it must "be presumed that, from the information possessed by it, the legislature concluded that the amount of the fees, as determined by the prescribed rates of percentage, was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

This conclusion is opposed to the United States Supreme Court's decision in Charlotte, C. & A. R. Co. v. Gibbs, 142 U. S. 386, 35 L. Ed. 1051, and Foote & Co. v. Stanley, 232

U. S. 494, 59 L. Ed. 698. In the Gibbs case the court holds that while railroads may be charged with the reasonable cost of their own supervision and regulation, they cannot be charged, consistently with the federal constitution, with the cost of regulating other corporations or with the performance of duties which are not of a regulatory character. In Foote & Co. v. Stanley it is held that where a statute levies a flat tax to pay the cost of inspection—a legitimate purpose—and also to pay the cost of other services not in the nature of inspection, the act is void, because it appears on the face of the statute that it levies more than is necessary to pay the cost of those services for which the tax may lawfully be imposed.

The latter case also holds that "if the state imposes upon one set of officers the performance of the two duties, and [fol. 125] pays the whole or a part of the joint expense out of inspection fees, it must be made to appear that such tax does not materially exceed the cost of inspection—*the burden in such cases being on those seeking to collect the combined charge.*" (Italics supplied.)

This principle the departmental opinion ignores and supplants by a presumption that "the legislature concluded that the amount of the fees * * * was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

When the Supreme Court of the United States holds that the burden of proof in such cases is upon those seeking to collect the combined charge, this court plainly errs in relieving the State of any burden by presuming that the Legislature acted reasonably. Rather should the presumption be, in view of the combined nature of the tax, that the Legislature acted unreasonably. The decision of the department is thus diametrically opposed to the position of the Supreme Court of the United States.

The findings of fact printed in our brief at pages 58 to 87 show in great detail the manifold and various duties of the Department of Public Works of a supervisory as well as of a non-supervisory nature, and show as well that in the performance of the latter the Department incurs large expenses payable out of the tax that we pay. These duties are laid upon the Department by law and are paid out of the taxes imposed by Chapter 107, Laws of 1929. We have then precisely the situation dealt with in the Foote case,

where legitimate and illegitimate expenses were sought to be imposed upon a taxpayer in a single flat fee or tax. The holding of the United States Supreme Court was that the State must show that the tax was reasonably necessary for the lawful purpose. This court in effect says in the departmental opinion that it will presume in favor of the State what the Federal Supreme Court says the State must show. By this reasoning the respondent is deprived of the [fol. 126] protection due it under the Federal Constitution.

II

The departmental opinion next considers, beginning on page 551, respondent's second contention that the invalidity of the act was established by evidence of its practical operation. Although having apparently held that evidence on this question was immaterial, the court does come to consider the question of fact. It states—contrary to the holding in Foote & Co. v. Stanley, supra—that the burden of proof was on the respondent railway companies to show that the expense was greater than the cost of their regulation. It states that a vast amount of supervision and regulation was necessary. But the departmental opinion makes no reference to our principal contention on this feature, viz., that expense incurred in relation to railroads was largely of a non-regulatory character, such as conducting litigation before the Interstate Commerce Commission in the interest of shippers of the State of Washington, hearing reparation claims, and other matters. The findings of the trial court go into these features in detail. (See pages 78-83 of our brief). This court makes no segregation of the cost of these expenses from the cost of proper supervisory expenses, but contents itself with the general holding that "in the very nature and necessity of things, such regulation must have a broad field, the extent of which must be determined by legislative discretion," and with a quotation from Charlotte, C. & A. R. Co. v. Gibbs, supra, that "regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortionate charges and unjust discrimination." But it is of no aid to point out that regulation covers a broad

field when, as here, there is a direct and uncontradicted showing that the railroads are taxed for the performance of duties outside this admittedly broad field.

[fol. 127] We submit that respondent should have, and that the Supreme Court of the United States will expect, a definite holding by this court that the challenged activities of the Department either were or were not within the field of proper supervision and regulation. When that direct question is faced and the duties of the Department are analyzed, both in the light of the statute imposing these duties and the evidence showing what the Department actually does, it must be agreed that the railroads are being taxed for purposes which are, as to them, illegitimate. No other conclusion is possible.

III

The departmental opinion does not sufficiently heed and decide the respondent's contention that Chapter 107, Laws of 1929, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies and many unrelated utility companies as well to pay the expense of regulating them all in the aggregate.

We submit that constitutional guarantees will not permit the imposition of an inspection fee upon some to discharge an obligation for which others are responsible. Chapter 107, Laws of 1929, imposes on railroads and a variety of other public utility companies a flat fee of one-tenth of one per cent of the gross income of each to pay the expenses incurred by the Department in regulating and supervising all of them,—to say nothing of its other non-regulatory activities. The fee paid by the railroads is not devoted by the act to the expense of supervising and regulating railroads. While the State may impose upon a single tribunal a variety of functions, it must also provide that the tax imposed upon each business shall be devoted to supervision and regulation of that business and be not unreasonably in excess thereof. Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. Ed. 685; Foote & Co. v. Stanley, supra. Each kind of business may be charged only with the expense [fol. 128] of its own regulation or inspection. Here the fee is not so limited, nor is any method of bookkeeping provided

whereby the taxpayer may assure himself that he is being legitimately taxed. He is left at the mercy of self-serving declarations by state officials "as to the ultimate fact." (Departmental opinion, page 553). If the constitutional contentions of the taxpayer are first to be rebutted by a presumption that the Legislature acted reasonably, and second, to be denied on the ground that while there is no official record of where the money went, the State Auditor may testify "as to the ultimate fact," then, indeed, the Constitution is to the taxpayer a mere ignis fatuus. Imagine a state official ever admitting the excessiveness of a tax used for the maintenance of his bureau.

We agree that regulation and supervision may be regarded by the Legislature as in the interest and for the benefit of the corporation as well as of the public. But this just principle is circumscribed and limited by the reasons for it. Therefore a regulatory fee must be devoted to and limited by the cost of reasonable and necessary supervision of the business or industry subjected to the tax, and this limitation must either be inherent in the legislative enactment or in official records from which the taxpayer may ascertain that he is not being mulcted for the benefit of others. The Washington statute does not embody these limitations, but requires the railway companies to pay in the dark, as it were, taxes which may be used by the Department of Public Works, without check or accounting, for the purpose of regulating and supervising other public utility corporations.

For these reasons we submit that Chapter 107, Laws of 1929, violates the due process and equal protection clauses of the Fourteenth Amendment as well as the Commerce Clause of the Constitution of the United States, and we pray that a rehearing en banc be granted so that these important [fol. 129] constitutional questions may have the consideration of the entire membership of the court.

Respectfully submitted, Thomas Balmer, Edwin C. Matthias, Attorneys for Respondent.

[fol. 130] In Supreme Court of Washington

[Title omitted]

Order Denying Petition for Rehearing Filed Feb. 10, 1936

The court having considered respondent's petition for a rehearing herein;

It is Ordered that the petition be and it hereby is denied.

Dated this 10th day of February, 1936.

By the Court:

William J. Millard, Chief Justice.

[File endorsement omitted.]

[fol. 131] In Supreme Court of Washington

No. 25732. Thurston County No. 14908

Great Northern Railway Company, a Corporation, Respondent,

vs.

The State of Washington, Appellant

Judgment March 3, 1936

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same, and being fully advised in the premises, it is now, on this 3rd day of March, A. D. 1936, on motion of C. W. Hamilton, Attorney General, Esquire, of counsel for appellant, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby reversed with direction to the trial court to dismiss the action, and that the said State of Washington have and recover of and from the said Great Northern Railway Company, a corporation, the costs of this action taxed and allowed at One Hundred Twenty-Two and 70/100 ($122.70) Dollars, and that execution issue therefor. And it is further ordered, that

this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Recorded in Journal 33, Page 119, Records of the Supreme Court of the State of Washington.

[fol. 132] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES.

[Title omitted]

PETITION FOR APPEAL. Filed March 3, 1936

To the Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, Great Northern Railway Company, a corporation, respectfully shows:

Your petitioner is the appellant in the above entitled cause:

This is an action at law by your petitioner to recover from the State of Washington the annual fees paid under protest to the Department of Public Works of Washington under Chapter 107, Laws of 1929 (Remington's Compiled Statutes, Section 10417), for the calendar years 1929 to 1933, inclusive, over and above the fees payable to the Department of Public Works under Chapter 107, Laws of 1923 (which latter statute is revived if Chapter 107, Laws 1929, is held unconstitutional), and over and above the fees due to the Secretary of State under Chapter 227, Laws 1929. The action was tried and decided upon the amended complaint, in which recovery was prayed for the years 1929 to 1932, inclusive. The fee for the year 1933, which was also paid under protest, was included by stipulation that the amended complaint should be construed as so further [fol. 133] amended. The original and amended complaints also attacked the fees payable to the Department of Public Works under Chapter 113, Laws 1921, as amended by Chapter 107, Laws 1923, and to the Secretary of State under Chapter 227, Laws 1929, but at the trial the plaintiff did not question the validity of those statutes.

The original complaint, served and filed March 30th, 1933, demanded a money judgment of $24,162.80, the total

annual fees paid under Chapter 107, Laws 1929, for the calendar years 1929 to 1932, inclusive, together with interest; the amended complaint, served and filed March 9th, 1934, as further amended by the stipulation of the parties, demanded this same sum for the calendar years 1929 to 1932, inclusive, together with interest, plus $3,137.05, the fee paid by plaintiff under said Chapter 107, Laws of 1929, for the calendar year 1933, together with interest; but by the withdrawal by plaintiff of its attack upon Chapter 113, Laws 1921, as amended, and Chapter 227, Laws 1929, the amount in controversy was reduced to $20,946.97 for the five calendar years 1929 to 1933, inclusive, plus interest of $4,519.50, a total of $25,466.47. Plaintiff recovered judgment for this amount, together with its costs, from defendant in the Superior Court of the State of Washington for Thurston County on the first day of April, 1935.

It was the contention of appellant in the trial court and the Supreme Court of the State that said Chapter 107, Laws of 1929, contravenes the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States. Appellant contended that said act is (1) void on its face, and (2) void because of its operative effect, (a) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all, in the aggregate; and (b) because the fee, [fol. 134] or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties and activities of the department which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

After hearing upon the merits the trial court on April 1, 1935, entered findings of fact, conclusions of law and judgment, concluding and deciding that said Chapter 107 of the Laws of 1929 violates Article I, Section 8, and the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States, and awarding appellant judgment against appellee as heretofore stated. Thereafter an appeal was taken by the State of Washington to the Supreme Court of the State of Washington,

which court, on December 12, 1935, reversed the judgment of the trial court, and upheld the validity of said act as not being in violation of any of said provisions of the Constitution of the United States, and remanded said cause to the Superior Court with directions to dismiss the action. Appellant on January 4th, 1936, filed a petition for rehearing, which the State Supreme Court denied on February 10th, 1936, and final judgment of the Supreme Court directing dismissal of the action was so entered on the 3rd day of March, 1936.

The Supreme Court of the State of Washington is the highest court of said state in which a decision in this suit can be had.

That in said cause there is drawn in question the validity of a statute of the State of Washington on the ground that said statute is repugnant to the Constitution of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates Article I, Section 8, and the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States.

[fol. 135] Therefore, in accordance with Section 237 (a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit, under Section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of Washington, the highest court of said state in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of Washington may be

examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Washington, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost and supersedeas bond tendered by the petitioner be approved, and that the said appeal may operate as a supersedeas.

Dated this 3rd day of March, 1936.

F. G. Dorety, Thomas Balmer, Edwin C. Matthias,
Attorneys for Petitioner.

[fol. 136] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed March 3, 1936

Statement

Appellant's main contention in the Supreme Court of the State of Washington was that Chapter 107, Laws of 1929, is void on its face (1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expense of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties and activities of the Department of Public Works which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

The Washington Supreme Court overruled this contention on the stated ground that nothing appears on the face

of the act to indicate that it is unconstitutional and that it "must * * * be presumed that from the information possessed by it, the legislature concluded that the amount [fol. 137] of the fees as determined by the prescribed rates of percentage was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

The court next considered respondent's second contention that the invalidity of the act was established by evidence of its practical operation. It held that the burden of proof was on the appellant to show that the fees collected from the railroads under the act exceeded the cost of their regulation and supervision. It stated that a vast amount of supervision and regulation was necessary. But it made no reference to appellant's principal contention on this feature, viz., that the expense incurred in relation to railroads was largely of a non-regulatory character, such as conducting litigation before the Interstate Commerce Commission in the interest of shippers of the State of Washington, hearing reparation claims and other matters. The findings of the trial court go into these features in detail. They show that the Department performs many "duties and functions relating to railroads of a non-supervisory and non-regulatory nature." The Washington Supreme Court made no segregation of the cost of these activities from the cost of proper supervisory activities, but contented itself with the general holding that "in the very nature and necessity of things such regulation must have a broad field, the extent of which must be determined by legislative discretion."

Finally, the Washington Supreme Court held that even if the State had the burden of proving that the fees collected from the railroads of the state under Chapter 107, Laws of 1929, did not exceed the cost of their proper supervision and regulation, the evidence proponderated against the findings made by the trial court as to the cost of supervising and regulating railroads. The findings of the trial court were based upon the annual reports of the Department of Public Works, made to the Governor as required by law. The evidence held by the Supreme Court to pre- [fol. 138] ponderate against these findings was that of the Auditor of the Department of Public Works, who testified that at his request, and not as a matter of official duty, the various employes of the Department handed him time slips,

showing the estimated time they devoted to the respective classes of utilities, and that this apportionment showed that the cost of "the railroad part of the Deparement of Public Works" exceeded the amount of the fees imposed upon the railroads by the act of 1929. The time turned in by the employes "took no account of the kind of work they were doing as to the regulation of railroads." It was admitted that these records were "not official in the sense of any rule or order of the Department that required them to be kept." The Auditor had no knowledge of his own whether the figures turned in by the employes were correct. This evidence of the Auditor was admitted after the case had been reopened to permit its introduction, and over appellant's objection that the evidence was hearsay. The trial court viewed the evidence as immaterial but admitted it because he "didn't want the case to come back here." The State Supreme Court held that "while the account kept by the Auditor was not official, in the sense that, of itself, it was admissible in evidence, yet what the Auditor did in that respect qualified him to testify as to the ultimate fact."

Assignment of Errors

Petitioner, Great Northern Railway Company, a corporation, assigns the following errors in the record and proceedings in this cause.

(1) The Supreme Court of the State of Washington erred in overruling appellant's contention that Chapter 107, Laws of 1929, is void on its face (1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility [fol. 139] companies as well, to pay the expenses of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties and activities of the department which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

(2) The Supreme Court of the State of Washington erred in holding that nothing appears on the face of the act to indicate that it is unconstitutional, and that it must "be presumed that, from the information possessed by it, the legislature concluded that the amount of the fees, as determined by the prescribed rates of percentage, was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

(3) The Supreme Court of the State of Washington erred in holding that although Chapter 107, Laws of 1929, imposes a flat fee on railroad companies and many unrelated utility companies as well, to pay the expenses of regulating them all in the aggregate, and also the expenses of any and all duties and activities of the Department in connection with rairoads and other utility companies,—many of which are not of a regulatory or supervisory nature,—the burden of proof was on the appellant to show that the fees collected from the railroads exceeded the cost of their regulation.

(4) The Supreme Court of the State of Washington erred in holding and deciding that the evidence preponderated against the findings made by the trial court as to the cost of supervising and regulating railroads, viz:

(a) that it is not, and has not been, possible to separate and compute the cost of performance by the Department of Public Works of its supervisory and regulatory duties relating to railroads from the cost and expense of its supervisory and regulatory duties relating to telephone and tele-
[fol. 140] graph, electrical, water, gas and other public utility corporations; (Finding of Fact IX).

(b) that in addition to its supervisory and regulatory duties relating to railroads said Department is required by law to perform various other duties and functions relating to railroads of a non-supervisory and non-regulatory nature; in particular, the Department has the duty of prosecuting or defending various rate cases before the Interstate Commerce Commission relating to rates of interstate railroads and to rates of railroads operating in other states and not subject to its jurisdiction; that the Department incurred a large expense in said non-regulatory and non-supervisory activities, but no account is required to be kept or was kept of the amount thereof and it is impossible to

determine the same, and no attempt was made to do so on the trial of this case; (Finding of Fact X).

(c) that the Department of Public Works has also undertaken to act in a judicial capacity in overcharge and reparation cases filed in that department by shippers against railroads, including plaintiff, and has held hearings, taken testimony and made and entered awards in many of such cases in favor of the shippers and against the railroads, including plaintiff; that the Department incurred a large expense in said overcharge and reparation cases, but no account is required to be kept or was kept of the amount thereof, and it is not only impossible to determine the cost of such cases to the Department, but no attempt was made to do so in the trial of this case; (Finding of Fact X-B).

(d) that said Chapter 107, Laws of 1929, and the fee imposed thereby on railroad companies, including plaintiff, is in fact a revenue measure intended to impose, and which does impose, upon railroads and other utility corporations the cost and expense of regulating and supervising railroads and other utility corporations, and to defray the cost and expense of all of the activities of the Department, whether [fols. 141-157] or not of a regulatory and supervisory nature, and the excess collected over expenditures reverts to and is a part of the general funds of the state. (Finding of Fact XII.)

(5) The Supreme Court of the State of Washington erred in ignoring the uncontradicted evidence that the expense incurred by the Department of Public Works in relation to railroads, and defrayed by the fees imposed upon appellant and other railroads by Chapter 107, Laws of 1929, is largely caused by activities of a non-regulatory character, the expense of which has not been and cannot be segregated or determined.

(6) The Supreme Court of the State of Washington erred in considering and in basing its decision upon the evidence of the Auditor of the Department of Public Works as to the expense incurred by the Department in supervising and regulating railroads, since such evidence was pure hearsay and was inadmissible for the purpose of determining the rights asserted by the appellant under the Federal Constitution.

(7) The Supreme Court of the State of Washington for each of the reasons contained in the foregoing assignments, erred in reversing the judgment of the Superior Court of Thurston County, and in directing that appellant's action against the appellee be dismissed.

Prayer for Reversal

Wherefore, on account of the errors specified herein appellant prays that the judgment of the Supreme Court of the State of Washington in this cause dated the 3rd day of March, 1936, be reversed and judgment here entered or directed in favor of appellant.

Dated this 3rd day of March, 1936.

F. G. Dorety, Thomas Balmer, Edwin C. Matthias,
Attorneys for Appellant.

[fol. 158] [File endorsement omitted]

In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—Filed March 3, 1936

The petition of the Great Northern Railway Company, a corporation, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been filed with the Clerk of this Court and presented herein accompanied by assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 3rd day of March, 1936, of the Supreme Court of the State of Washington as prayed in said petition, and that the Clerk of the Supreme Court of the State of Washington shall within sixty days from this date make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be desig-

nated by præcipe or stipulation of the parties or their coun-
[fols. 159 & 160] sel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that said appellant shall have a good and sufficient cost and supersedeas bond in the sum of $5,000.00, that said appellant shall prosecute said appeal to effect and answer all damages and costs if it fails to make its plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate or remittitur herein and all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

It is further Ordered that appellee, the State of Washington, shall have the right to move for increase of said bond if, at any time, it shall deem itself insecure.

Dated this 3rd day of March, 1936.

William J. Millard, Chief Justice of the Supreme Court of the State of Washington.

[fols. 161-163] Supersedeas bond on appeal for $5,000.00, approved and filed March 3, 1936, omitted in printing.

[fols. 164 & 165] Citation, in usual form, showing service on G. W. Hamilton et al., filed March 3, 1936, omitted in printing.

[fol. 166] In Supreme Court of the United States

[Title omitted]

Præcipe for Transcript of Record on Appeal to the United States Supreme Court—Filed March 19, 1936

To the Clerk of the Supreme Court of the State of Washington:

You will please make and transmit to the United States Supreme Court under your hand and the seal of the Supreme Court of the State of Washington a true copy of the following material parts of the record in the above entitled cause:

1. Amended Complaint.
2. Answer to Amended Complaint.
3. Findings of Fact and Conclusions of Law of the Superior Court of the State of Washington for Thurston County.
4. Judgment of the Superior Court of the State of Washington for Thurston County, dated April 1, 1935.
5. Statement of Facts certified by the Judge of the Superior Court, including all Exhibits.
[fols. 167 & 168] 6. Notice of Appeal to Washington Supreme Court.
7. Opinion of Washington Supreme Court.
8. Petition for Rehearing.
9. Order Denying Petition for Rehearing.
10. Judgment of Washington Supreme Court.
11. Petition for Appeal to United States Supreme Court.
12. Assignment of Errors and Prayer for Reversal.
13. Statement as to Jurisdiction on appeal.
14. Order Allowing Appeal.
15. Cost and Supersedeas Bond.
16. Acknowledgment of Service of Petition for Appeal, Order Allowing Appeal, Assignment of Errors and Prayer for Reversal, and Statement as to Jurisdiction.
17. Citation, with acknowledgment of service.
18. This Præcipe.

Dated at Seattle, Washington, this 3rd day of March, 1936.

F. G. Dorety, Thomas Balmer, Edwin C. Matthias, Attorneys for Appellants. Address: 404 Union Street, Seattle, Washington.

Service of a copy of the foregoing Præcipe acknowledged this 3d day of March, 1936.

G. W. Hamilton, Atty. General; Geo. G. Hannan, Asst. Atty. General, Attorneys for Appellee. Address: Temple of Justice, Olympia, Washington.

[File endorsement omitted.]

[fol. 169] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

MOTION AND DEMURRER TO AMENDED COMPLAINT—Filed April 3, 1934

Comes now the Defendant by its attorneys of record herein and moves the Court:

I

That the first purported cause of Action in said Amended Complaint be ordered stricken out of the cause for the reason that the same contains more than one cause of action and said causes were not separately stated.

II

That in case motion number I be overruled that plaintiff be required to separately state and consecutively number the several causes of action in said purported First Cause of Action contained.

III

That the last paragraph of that portion of Plaintiff's said Amended Complaint designated as paragraph XIV be ordered stricken therefrom as irrelevant, redundant and immaterial.

[fol. 170]

IV

That paragraph XV of said Amended Complaint be ordered stricken therefrom as irrelevant, redundant and immaterial matter.

V

In case motion number IV be overruled that the Plaintiff be required to make said paragraph XV more definite and certain by setting out therein the amount of the alleged excess sum of Two Hundred Fifty ($250) Dollars accumulated during the year involved in said cause of action over and above the amount expended by the Department of Public Works in the discharge of its duties.

VI

That paragraph XVI of said cause of action be ordered stricken therefrom as irrelevant, redundant and immaterial matter.

VII

In case motion number VI be overruled that subdivision B of paragraph XVI be made more definite and certain by setting out therein the part or portion of the tax therein mentioned and alleged to be unrelated to the operating of common carrier railways.

VIII

In case motion number VI be overruled that subdivision D of said paragraph XVI be made more definite and certain by setting out therein what portion of the funds collected by the defendant had been used in proceedings before the Interstate Commerce Commission in connection with interstate rates and facilities.

[fol. 171] Defendant moves against the Second Cause of Action contained in Plaintiff's Amended Complaint and in doing so hereby adopts and re-alleges each and all of Defendant's motion against the First Cause of Action as against the Second Cause of Action and the paragraphs thereof respectively.

Defendant moves against the Third Cause of Action contained in Plaintiff's Amended Complaint and in doing so hereby adopts and re-alleges each and all of Defendant's motion against the First Cause of Action as against the Third Cause of Action and the paragraphs thereof respectively.

Defendant moves against the Fourth Cause of Action contained in Plaintiff's Amended Complaint and in doing so hereby adopts and re-alleges each and all of Defendant's motion against the First Cause of Action as against the Fourth Cause of Action and the paragraphs thereof respectively.

G. W. Hamilton, Attorney General; Geo. G. Hannan, Assistant Attorney General, Attorneys for Defendant.

[fol. 172] DEMURRER

Defendant demurs to the First Cause of Action in Plaintiff's Amended Complaint contained upon the following grounds and for the following reasons, to-wit:

I

That the Plaintiff has no legal capacity to sue.

II

That said purported cause of action does not state facts sufficient to constitute a cause of action.

Defendant demurs to the Second Cause of Action in Plaintiff's Amended Complaint contained upon the following grounds and for the following reasons, to-wit:

I

That the Plaintiff has no legal capacity to sue.

II

That said purported cause of action does not state facts sufficient to constitute a cause of action.

Defendant demurs to the Third Cause of Action in Plaintiff's Amended Complaint contained upon the following grounds and for the following reasons, to-wit:

I

That the Plaintiff has no legal capacity to sue.

II

That said purported cause of action does not state facts sufficient to constitute a cause of action.

Defendant demurs to the Fourth Cause of Action in Plaintiff's Amended Complaint contained upon the following grounds and for the following reasons, to-wit:

[fol. 173] I

That the Plaintiff has no legal capacity to sue.

II

That said purported cause of action does not state facts sufficient to constitute a cause of action.

G. W. Hamilton, Attorney General; Geo. G. Hannan, Assistant Attorney General, Attorneys for Defendant.

[File endorsements omitted.]

[fol. 174] PLAINTIFF'S EXHIBIT No. 4

Thurston County Cause No. 14908-11

Date Admitted 1/3/35

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

Filed in Clerk's Office Supreme Court State of Washington Jun. 25, 1935, Benj. T. Hart, Clerk, by Stewart, Dep.

No. 14909

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,

v.

STATE OF WASHINGTON, Defendant

STIPULATION

It is Stipulated that the plaintiff paid the fee prescribed by Chapter 107, Laws of 1929, for the year ending December 31, 1933, under protest, as per attached copies, amounting to $5,700.53, and that the plaintiff's amended complaint may be considered as amended or supplemented to claim recovery for the fee for the year ending December 31, 1933, and that judgment may be rendered for or against the plaintiff or defendant on account of said payment for the year 1933 as is rendered for fees paid for the other years involved in said amended complaint and that no for-

mal amended or supplemental complaint need be filed covering said payment for the year 1933, and defendants' motions and demurrers to amended complaint shall apply thereto.

Dated the 10th day of April, 1934.

L. B. daPonte, Attorney for Plaintiff; G. W. Hamilton, Atty. General; Geo. G. Hannan, Asst. Atty. General, Attorneys for Defendant.

Filed Superior Court Thurston Co., Wash., Apr. 13, 9:02 A..M., 1934—Paul Paulk, Clerk, by —— ——, Deputy.

[fol. 175] (Copy)

8284.

To the Department of Public Works of Washington:

The Northern Pacific Railway Company hereby tenders to you the sum of Fifteen Hundred Dollars ($1500.00), being the amount of the fee for year ended December 31, 1933, provided by Section 10417 of Remington Compiled Statutes, which tender is made without prejudice to the claim of the Northern Pacific Railway Company that said section 10417 is and constitutes a burden upon interstate commerce as applied to the Northern Pacific Railway Company, contrary to Article I, Section 8 of the Constitution of the United States. The Northern Pacific Railway Company makes this tender and payment without prejudice to your right to claim the fee provided by Chapter 107, Laws of 1929 amending said Section 10417. The Northern Pacific Railway Company alleges that the fee provided to be paid by said Chapter 107, Laws of 1929, is, as to it, a burden on interstate commerce, contrary to Article I, Section 8 of the Constitution of the United States; and is discriminatory and unequal in its application to other like corporations similarly situated and in violation of the 14th Amendment to the Constitution of the United States.

Dated the — day of March, 1934.

Northern Pacific Railway Company, by L. B. daPonte, Western Counsel.

The Department of Public Works of Washington hereby acknowledges that the foregoing tender was made and refused on the 29th day of March, 1934.

Department of Public Works of Washington, by C. S. Stookey, Auditor.

[fol. 176] (Copy)

8284.

Protest

The Department of Public Works of Washington hereby acknowledges receipt from the Northern Pacific Railway Company of the sum of Five Thousand Seven Hundred and 53/100 Dollars ($5,700.53), being the fee prescribed by Chapter 107, Laws of 1929, for year ended December 31, 1933.

The Northern Pacific Railway Company pays said fee under protest for the reason that it claims that said Chapter 107, Laws of 1929, levies an unlawful tax and fee and imposes a burden upon interstate commerce, contrary to Article I, Section 8 of the Constitution of the United States, and is as to the Northern Pacific Railway Company null and void. The Northern Pacific Railway Company further alleges that said tax or fee is discriminatory and unequal in its application to other like corporations similarly situated, and is in violation of the 14th Amendment to the Constitution of the United States and null and void as to said Northern Pacific Railway Company.

Dated the 29th day of March, 1934.

Department of Public Works of Washington, by C. S. Stookey, Auditor.

[fol. 177] In Supreme Court of the United States

[Title omitted]

Præcipe for Additional Portions of Record—Filed March 24, 1936

To the Clerk of the Supreme Court of the State of Washington:

You will please make and transmit to the United States Supreme Court under your hand and the seal of the Supreme Court of the State of Washington, a true copy of the following material parts of the record in the above entitled cause:

1. Defendant's motions against amended complaint;
2. Defendant's demurrer to amended complaint;

3. Exhibit No. 4, to the testimony;
4. Copy of this præcipe.

Dated at Olympia, Washington, this 24th day of March, 1936.

G. W. Hamilton, Attorney General; Geo. G. Hannan, Assistant Attorney General, Attorneys for Appellee. Post Office Address: Temple of Justice, Olympia, Washington.

[File endorsement omitted.]

[fol. 178] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 179] Clerk's certificate to exhibits omitted in printing.

[fol. 180] PLAINTIFF'S EXHIBIT No. 1

Thurston County Cause No. 14908-11

Date Admitted 1/3/35

Receipt for Payment under Protest

The Department of Public Works of Washington hereby acknowledges receipt from the Great Northern Railway Company of the sum of $3,137.05, being fee prescribed by Chapter 107, Laws of 1929, for the calendar year ended December 31, 1933.

The Department acknowledges that the Great Northern Railway Company paid said fee under protest, for the reason that it claims that said Chapter 107, Laws of 1929, imposes a tax on said Railway Company's property devoted to commerce among the states and with foreign nations, and a tax on such commerce in violation of Section 8, Article I of the Constitution of the United States, and operates to tax the property of said Railway Company in other states having no taxable situs in Washington, and thus deprives it of its property without due process of law, in violation of the

Fourteenth Amendment to the Constitution of the United States, and that said tax or fee is discriminatory and unequal as between said Great Northern Railway Company and other corporations similarly situated, and thus denies said Railway Company the equal protection of the laws, in violation of said Fourteenth Amendment to the Constitution of the United States, and that the tax imposed by said statute is in violation of the Constitution of the United States, in that it is imposed at least in part for the purpose of regulating and inspecting other public utilities, in no way related to, or connected with the business of operating a common carrier railway, and for the purpose of defraying the expense of performing functions and furnishing services entirely disconnected from the regulation of railways, and for the purpose of regulating and supervising interstate services, facilities and rates of railroads engaged in interstate commerce; that the tax is imposed and used in part for the purpose of defraying the expenses of the Department of Public Works in proceedings before the Interstate Commerce Commission, in connection with interstate rates, services and facilities, and that no such tax is imposed upon persons directly benefited by such proceeding, and that the fees collected have exceeded the cost of regulation and inspection of the railroads by such a large sum that the tax imposed by said statute is unreasonable and disproportionate to the services rendered, and that Chapter 107, Laws of 1929, in effect levies a tax upon revenue derived from the transportation of mails, passengers, freight and express for the Government of the United States, and thereby imposes a burden upon, and interferes with, the exercise of governmental powers of the Federal Government, which the Constitution of the United States contemplates shall be supreme and independent of state supervision or regulation, and for said reasons the tax or fee imposed by said Chapter 107, Laws of 1929, is unlawful, null and void as to said Great Northern Railway Company.

Dated the 29th day of March, 1934.

Department of Public Works of Washington, by C. L. Stookey, Auditor.

[fol. 181] PLAINTIFF'S EXHIBIT No. 2

Thurston County Cause No. 14908-11

Date Admitted 1/3/35

Department of Public Works,
State of Washington,
Olympia, Wash.

No. 8290.
Mar. 29, 1934.

Received from C. M. St. P. & P. R. R. Co.
Seattle

A. T. Gross Revenue Fee	
A. T. Application Fee	
Report Filing Fee, Year 1933	1302.16
M. V. Permit Gross Revenue Fee	
M. V. Permit Application Fee	
M. V. Permit License Plates	
Storage Warehouse Gross Rev. Fee	
Storage Warehouse Application Fee	
Scale Test Fee, Report No	
Miscellaneous Fee, Bill No	
Certified Boat Fee	
Office of Transportation Accountant	
To be Refunded to (Paid under Protest)	
Total	1302.16

Department of Public Works, by C. S. Stookey, Cashier.

[fols. 182-448] PLAINTIFF'S EXHIBIT No. 3

Thurston County Cause No. 14908-11

Date Admitted 1/3/35

The Department of Public Works of the State of Washington hereby acknowledges receipt from the Oregon-Washington Railroad & Navigation Company of the sum of Seven Hundred Twelve and 87/100 Dollars ($712.87), being the fee prescribed by Chapter 107, Laws of 1929.

The Oregon-Washington Railroad & Navigation Company pays said fee under protest for the reason that it claims that said Chapter 107, Laws of 1929, levies an unlawful tax and fee and imposes a burden upon interstate commerce, contrary to Article 1, Section 8 of the Constitution of the United States, and is, as to the Oregon-Washington Railroad & Navigation Company, null and void. The Oregon-Washington Railroad & Navigation Company further alleges that said tax or fee is discriminatory and unequal in its application to other like corporations similarly situated, and is in violation of the 14th Amendment to the Constitution of the United States and null and void as to said Oregon-Washington Railroad & Navigation Company.

Dated the 28 day of March 1934.

Department of Public Works by C. L. Stookey, Auditor.

[fols. 449-646)

PLAINTIFF'S EXHIBIT No. 12

Thurston County Cause No. 14908-11

Date Admitted 1/3/35

Great Northern Railway Company

	1929	1930	1931	1932	1933
Miles of Track Operated:					
Within State	1,935.85	1,938.65	1,931.57	1,925.50	1,929.19
Outside of State	9,932.73	9,996.89	9,992.67	10,124.06	10,906.85
Total for System	11,868.58	11,935.54	11,924.24	12,049.56	11,936.04
Amount of Stock Authorized:					
Common Stock:					
Par Value	None	None	None	None	None
Number of Shares	None	None	None	None	None
Preferred Stock:					
Par Value	$100	$100	$100	$100	$100
Number of Shares	2,500,000	2,500,000	2,500,000	2,500,000	2,500,000
Revenue from Operations:					
Total Railway Operating Revenue (Entire System)	$125,932,807.81	$104,996,076.26	$77,087,454.70	$55,549,246.37	$61,923,891.43
Total Railway Operating Revenue	17,549,476.39	15,372,895.03	11,778,584.93	8,389,154.17	8,114,350.47
(State Only)	8,027,770.40	7,267,082.52	5,528,981.62	3,338,973.43	3,137,046.87
From Intrastate	9,521,705.99	8,105,812.51	6,249,603.31	5,050,180.74	4,977,303.60
From Interstate					
Value in State as Fixed by Tax Commission:					
Actual Value	81,000,000	81,000,000	81,000,000	69,574,000	66,100,000
Equalized Value	35,356,975	35,381,092	35,384,885	30,710,723	29,304,046

[fol. 647] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 648] SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND PARTS OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF—Filed March 30, 1936

Appellant intends to reply upon the following points as ground for the reversal of the judgment of the Supreme Court of the State of Washington from which this appeal is taken:

(1) The Supreme Court of the State of Washington erred in overruling appellant's contention that Chapter 107, Laws of 1929, is void on its face (1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties and activities of the department which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

[fol. 649] (2) The Supreme Court of the State of Washington erred in holding that nothing appears on the face of the act to indicate that it is unconstitutional, and that it must "be presumed that, from the information possessed by it, the legislature concluded that the amount of the fees, as determined by the prescribed rates of percentage, was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

(3) The Supreme Court of the State of Washington erred in holding that although Chapter 107, Laws of 1929, imposes a flat fee on railroad companies and many unrelated utility companies as well, to pay the expenses of regu-

lating them all in the aggregate, and also the expenses of any and all duties and activities of the Department in connection with railroads and other utility companies,—many of which are not of a regulatory or supervisory nature,—the burden of proof was on the appellant to show that the fees collected from the railroads exceeded the cost of their regulation.

(4) The Supreme Court of the State of Washington erred in holding and deciding that the evidence preponderated against the findings made by the trial court as to the cost of supervising and regulating railroads, viz:

(a) that it is not, and has not been, possible to separate and compute the cost of performance by the Department of Public Works of its supervisory and regulatory duties relating to railroads from the cost and expense of its supervisory and regulatory duties relating to telephone and telegraph, electrical, water, gas and other public utility corporations; (Finding of Fact IX).

(b) that in addition to its supervisory and regulatory duties relating to railroads said Department is required by law to perform various other duties and functions relating to railroads of a non-supervisory and non-regulatory nature; in particular, the Department has the duty of prosecuting or defending various rate cases before the Inter-[fol. 650] state Commerce Commission relating to rates of interstate railroads and to rates of railroads operating in other states and not subject to its jurisdiction; that the Department incurred a large expense in said non-regulatory and non-supervisory activities, but no account is required to be kept or was kept of the amount thereof and it is impossible to determine the same, and no attempt was made to do so on the trial of this case; (Finding of Fact X).

(c) that the Department of Public Works has also undertaken to act in a judicial capacity in overcharge and reparation cases filed in that department by shippers against railroads, including plaintiff, and has held hearings, taken testimony and made and entered awards in many of such cases in favor of the shippers and against the railroads, including plaintiff; that the Department incurred a large expense in said overcharge and reparation cases, but no account is required to be kept or was kept of the amount thereof, and it is not only impossible to determine the cost of such

cases to the Department, but no attempt was made to do so in the trial of this case; (Finding of Fact X-B).

(d) that said Chapter 107, Laws of 1929, and the fee imposed thereby on railroad companies, including plaintiff, is in fact a revenue measure intended to impose, and which does impose, upon railroads and other utility corporations the cost and expense of regulating and supervising railroads and other utility corporations, and to defray the cost and expense of all of the activities of the Department, whether or not of a regulatory and supervisory nature, and the excess collected over expenditures reverts to and is a part of the general funds of the state. (Finding of Fact XII).

(5) The Supreme Court of the State of Washington erred in ignoring the uncontradicted evidence that the expense incurred by the Department of Public Works in relation to railroads, and defrayed by the fees imposed upon appellant [fol. 651] and other railroads by Chapter 107, Laws of 1929, is largely caused by activities of a non-regulatory character, the expense of which has not been and cannot be segregated or determined.

(6) The Supreme Court of the State of Washington erred in considering and in basing its decision upon the evidence of the Auditor of the Department of Public Works as to the expense incurred by the Department in supervising and regulating railroads, since such evidence was pure hearsay and was inadmissible for the purpose of determining the rights asserted by the appellant under the Federal Constitution.

(7) The Supreme Court of the State of Washington for each of the reasons contained in the foregoing assignments, erred in reversing the judgment of the Superior Court of Thurston County, and in directing that appellant's action against the appellee be dismissed.

Appellant thinks the following parts of the record are necessary for the consideration of said points and requests that said parts of the record be printed:

1. Amended Complaint
2. Answer to Amended Complaint
3. Findings of Fact and Conclusions of Law of the Superior Court of the State of Washington for Thurston County

4. Judgment of the Superior Court of the State of Washington for Thurston County, dated April 1, 1935

5. Statement of Facts certified by the Judge of the Superior Court, including Exhibits 1, 2, 3, and 12, but excluding Exhibits 5, 6, 7, 8, 9, 11 and 13 (printed pamphlets)

6. Notice of Appeal to Washington Supreme Court.

7. Opinion of Washington Supreme Court

8. Petition for Rehearing

9. Order denying Petition for rehearing.

10. Judgment of Washington Supreme Court

[fol. 652] 11. Petition for Appeal to United States Supreme Court

12. Assignment of Errors and Prayer for Reversal

13. Statement as to Jurisdiction on Appeal

14. Order allowing Appeal

15. Cost and Supersedeas Bond

16. Acknowledgment of Service of Petition for Appeal, Order allowing Appeal, Assignment of Errors and Prayer for Reversal, and Statement as to Jurisdiction

17. Citation, with acknowledgment of service

18. Præcipe for Transcript on Appeal.

Dated at Seattle, Washington, this 16th day of March, 1936.

F. G. Dorety, Office Address: 1120 Great Northern Building, Saint Paul, Minnesota; Thomas Balmer, Edwin C. Matthias, Office Address: 404 Union Street, Seattle, Washington, Attorneys for Appellant.

Service of a copy of the foregoing Statement acknowledged this 19 day of March, 1936.

G. W. Hamilton, Attorney General; Geo. G. Hannan, Assistant Attorney General; Office Address: Temple of Justice, Olympia, Washington, Attorneys for Appellee.

[fol. 653] [File endorsement omitted.]

Endorsed on cover: File No. 40,432. Washington Supreme Court. Term No. 878. Great Northern Railway Company, appellant, vs. State of Washington. Filed March 30, 1936. Term No. 878, O. T., 1935.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. [redacted] 20

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION ON APPEAL.

E. C. Dobbs,
Thomas Balmer,
Edward C. Mathias,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 878

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Judicial Code, Sec. 237 (a) (28 U. S. Code, Sec. 344), reading, to the extent relevant here, as follows:

"Section 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision

> could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

The remedy by writ of error under the foregoing section, has been abolished and an appeal substituted.

> Act of January 31, 1928, as amended by the Act of April 26, 1928; 45 Stat. 54; 45 Stat. 466 (28 U. S. Code, Sec. 861 a, 861 b);
>
> *Nashville, etc., Ry.* v. *White*, 278 U. S. 456, 460;
>
> *Great Northern Ry. Co.* v. *Minnesota*, 278 U. S. 503, 506;
>
> *Larson* v. *South Dakota*, 278 U. S. 429, 432.

B.

Statute of the State the Validity of Which Is Involved.

The statute of the State of Washington, the validity of which has been sustained by the Supreme Court of the State of Washington, the highest court of said State, as not being violative of or repugnant to the provisions of the Constitution and Laws of the United States, is Chapter 107, Session Laws of 1929, State of Washington. The pertinent provisions thereof are:

> "CHAPTER 107.
>
> (H. B. 200.)
>
> Fees Required of Public Utility Companies.
>
> AN ACT relating to public utility companies, providing for increased fees and amending Section 1 of Chapter 113 of the Laws of 1921, as amended by Section

1 of Chapter 107 of the Laws of 1923 (Section 10417 of Remington's Compiled Statutes).

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That section 1 of Chapter 113 of the Laws of 1921, as amended by section 1 of chapter 107 of the Laws of 1923 (section 10417 of Remington's Compiled Statutes) be amended to read as follows:

SECTION 1. That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under chapter 248 of the Laws of 1927, shall, on or before the first day of April of each year, file with the department of public works a statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue: *Provided*, That the fee so paid shall in no case be less than ten dollars."

Section 2 of Chapter 113, Laws of 1921, which remained in effect with the foregoing amendment of Section 1, reads as follows:

"SEC. 2. All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the State treasurer, and by him deposited in a fund to be known as the public service revolving fund."

C.

Date of Judgment and Date of Application for Appeal.

The date of the final judgment of the Supreme Court of the State of Washington sought to be reviewed is March 3rd, 1936.

The judgment of the Supreme Court of the State of Washington was a judgment reversing the judgment of the trial court holding the aforesaid Chapter 107 unconstitutional. The judgment of the Supreme Court of Washington directed the Superior Court to dismiss the action. This judgment of the Supreme Court of the State of Washington is a final judgment within the meaning of Judicial Code, Sec. 237.

Rio Grande Western R. Co. v. *Stringham*, 239 U. S. 44.
Gulf Refining Co. v. *U. S.*, 269 U. S. 125.

The time for taking the appeal began to run on the date of such final judgment, to-wit, March 3rd, 1936. (See *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, where the time for appealing from the judgments of the Supreme Court of the State of Washington is considered.)

The date on which the application for appeal was presented and the appeal allowed is March 3rd, 1936.

D.

Nature of Case and Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdictional provision relied on are as follows:

On March 9th, 1934, appellant Great Northern Railway Company, a corporation, filed its amended complaint against the State of Washington, appellee, in the Superior Court of Thurston County, Washington, to recover from the State of Washington the annual fees paid under protest to the Department of Public Works of Washington under Chapter 107, Laws of 1929 (Remington's Compiled Statutes, Section 10417), for the calendar years 1929 to 1932, inclusive. At the trial it was stipulated that the fee

for the year 1933, which was also paid under protest, should be included in the action. The amended complaint also attacked the fees payable to the Department of Public Works under Chapter 113, Laws 1921, as amended by Chapter 107, Laws 1923, and to the Secretary of State under Chapter 227, Laws 1929, but at the trial the appellant did not question the validity of those statutes. The issue was thus limited to the constitutionality of Chapter 107, Laws of 1929.

The amended complaint demanded a money judgment of $24,162.80, the total annual fees paid by appellant under Chapter 107, Laws 1929, for the calendar years 1929 to 1932, inclusive, together with interest; the amendment made by stipulation at the trial increased the amount demanded by $3,137.05, the fee paid by appellant for the calendar year 1933, together with interest; but by the withdrawal by appellant of its attack upon the prior statutes, the amount in controversy was reduced to $20,946.97 for the five calendar years 1929 to 1933, inclusive, plus interest, a total of $25,466.47. Appellant was granted judgment for this amount, together with its costs, against appellee in the Superior Court of the State of Washington for Thurston County on the first day of April, 1935.

Appellant alleged in its amended complaint and contended in the trial court and the Supreme Court of the State that said Chapter 107, Laws of 1929, contravenes the 14th Amendment and the Commerce Clause of the Constitution of the United States. Appellant contended that said act is (1) void on its face, and (2) void because of its operative effect, (a) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all,

in the aggregate; and (b) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties and activities of the department which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

Appellee's answer admitted the payment by appellant of the annual fees under protest; admitted "that the Department of Public Works exercises jurisdiction and supervision over many classes of public utilities including common carriers in the State of Washington, and that property belonging to plaintiff in the State of Washington is assessed upon an ad valorem basis for taxation like other property within the State;" admitted appellant's corporate status and capacity to sue, but denied substantially all other allegations of the amended complaint.

The amended complaint attacked Chapter 107, Laws of 1929, whether considered as imposing an occupation or excise tax or as imposing an inspection or regulatory fee. After the commencement of the suit the Supreme Court of the State held that the act imposes a regulatory or inspection fee, not an occupation or excise tax. See *Pacific T. & T. Co.* v. *Seattle,* 172 Wash. 649, 21 Pac. (2d) 721, affirmed in 291 U. S. 300. In that case it was also held by the State Supreme Court that the fund created by the fees paid under Chapter 107, Laws 1929, is solely for the purpose of defraying the expenses attendant upon the administration of the Public Service Commission law of the State. In view of this holding, which defines the fee under attack as one to pay the expense of regulation and supervision, many of the allegations of the complaint became irrelevant.

Paragraph XV of appellant's amended complaint (first cause of action), however, is especially directed to the point that the act is invalid as an inspection or regulatory fee. This paragraph alleges:

> "Under the Public Service Commission Law (Chapter 117, Session Laws 1911, Sections 10339 to 10490, inclusive, R. C. S., as amended) and under other laws of this state, the Department of Public Works exercises jurisdiction over and supervision of many classes of public utilities, including common carriers by rail, railroads operated by electricity, street railways, gas, electrical and water companies, telegraph and telephone companies, wharfingers and warehousemen, carriers by water, and many other activities wholly disconnected from and unrelated to its duties of inspection and supervision of common carriers by railroad, and is charged with the performance of a variety of duties, other than those pertaining to inspection and supervision of common carriers by railroad under the police power of the state. If Chapter 113, Session Laws of 1921, Chapter 107, Session Laws of 1923, and Chapter 107, Session Laws of 1929, or any of them be construed as imposing a fee for supervision and inspection, then said statutes, and each of them, do not restrict the fee to be paid by plaintiff or other common carriers by rail, to the cost of legitimate regulation or supervision, nor is such fee based upon the proper cost or expense thereof, but the same is a flat fee of a percentage of gross revenue levied upon carriers by rail, and other corporations, for the purpose of paying the expense of supervising and inspecting a variety of independent and unrelated corporations, as above alleged, and for the purpose of paying the expense of performance of a variety of unrelated duties, including the expense of performing duties and discharging functions which properly pertain to inspection, supervision and regulation, and many expenses of performing duties and discharging functions, such as business and policing expenses, the expense whereof cannot be

imposed upon common carriers by rail, including plaintiff, as legitimate expenses of supervising, inspecting and regulating such common carriers by rail. The fee or tax provided by said Chapter 107, Session Laws of 1929, and the other statutes hereinbefore mentioned, is grossly in excess of the reasonable cost of inspection and supervision of common carriers by rail. Plaintiff is informed and believes, and alleges that there has been accumulated from the fees paid under said acts, up to and including the first of January, 1933, the sum of more than $250,000 in excess of the amount expended by the Department of Public Works in the discharge of its manifold duties and functions under the laws of this state. Said fee or tax is not a reasonable or legitimate inspection or supervision fee or tax, but said statutes, and each of them, are in truth and in fact, revenue measures. The taxes imposed by and under said statutes are made payable into the public service revolving fund, which fund is a general state fund, subject to withdrawal for various and sundry expenses of the state, and not solely devoted by law to the expense incurred by the Department of Public Works in the performance of its duties of inspection or supervision of common carriers by rail, or other corporations or businesses subject to its jurisdiction. Said fee or tax, if construed to be a supervision or inspection fee or tax, is and constitutes a burden on, and regulation of, interstate commerce in violation of Section 8, Article 1 of the Constitution of the United States, is capricious, arbitrary, excessive and unreasonable, and is discriminatory and unequal, denies to plaintiff the equal protection of the laws, and deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 3 and 12 and Article VII, Sections 1, 2 and 3 of the State Constitution."

The Superior Court of the State of Washington held Chapter 107, Laws 1929, to be unconstitutional on its face

(a) because it imposes a flat fee or tax upon railroads and other unrelated utility companies, not limited or measured by the expense of regulating them respectively but to pay the expenses of regulating them all in the aggregate, and (b) because the fee or tax is imposd and used to pay the expense of many duties and activities of the Department of Public Works which are not of a regulatory or supervisory nature but are administrative, police or judicial. For the purpose of the record, however, the Superior Court admitted evidence to show the operative effect of the act, and from such evidence found and concluded that the fees collected by the Department of Public Works were unreasonable and bore no just relation to the cost of regulation and inspection of railroads.

The trial court's findings show that, under the public service commission law and other laws, the Department of Public Works exercises jurisdiction over and supervises many classes of public utilities, including common carriers by rail, electric and street railways, gas, electrical and water companies, telegraph and telephone companies, wharfingers and warehousemen, and carriers by water, with respect to which it exercises many regulatory and supervisory duties; that the Department also has many other important duties wholly unrelated to its duties of inspection and supervision of railroads and other utilities, including the duty, prescribed by Sec. 10394, Remington's Compiled Statutes, to take part in litigation before the Interstate Commerce Commission with respect to interstate rates; that the Department is constantly engaged in such litigation and incurs large expense, as may be seen from its annual reports in evidence; that the Department takes sides and participates in such litigation, sometimes on the side of the carriers operating in this State, and at other times against them, and sometimes in favor of some carriers in the State and against others operating in the State; that under Sections 10433

and 10434, Remington's Compiled Statutes, the Department acts judicially in ordering refunds of alleged overcharges—a prolific source of litigation and expense, as may be seen from the annual reports; that Section 10442, Remington's Compiled Statutes, provides for litigation to enforce the orders of the Department, which is also a source of considerable expense; that in none of these activities does the Department exercise supervisory or regulatory authority of which the cost can be charged to railroads.

The trial court concluded and decided that said Chapter 107, Laws 1929, violates Article I, Section 8, and the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States, and, as heretofore stated, awarded appellant judgment against appellee for recovery of the excess amounts of the fees paid. Thereafter an appeal was taken by the State of Washington to the Supreme Court of the State of Washington, which court on December 12, 1935, delivered an opinion upholding the validity of said act as not being in violation of any of said provisions of the Constitution of the United States, and remanded said cause to the Superior Court with directions to dismiss the action. Appellant on January 4, 1936, filed a petition for rehearing, which the State Supreme Court denied on February 10, 1936, and final judgment of the Supreme Court directing dismissal of the action was so entered on the 3rd day of March, 1936. The opinion and judgment which the Supreme Court rendered and entered are not, and could not have been rendered or entered without denying to appellant all of the rights asserted by it under said constitutional provisions, and said opinion and judgment are not and can not be rested upon any independent non-Federal grounds.

The opinion of the Supreme Court of Washington (84 Wash. Decisions, 545-555) is in part as follows:

"* * * Two questions are thus presented to us for determination: (1) Whether the act is unconstitutional on its face, and (2) whether it is invalid because of its operative effect.

"Respondent's main contention is that the act is void on its face (1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of any and all duties and activities of the department, whether regulatory, administrative, police, or judicial. It is contended that, because of its unlimited scope, as thus challenged, the act contravenes the fourteenth amendment of the constitution of the United States and also the fourteenth amendment of the constitution of the state of Washington.

"* * *

"In considering the question of the constitutionality of a legislative act, two principles, well settled in this state, must be kept in mind. The first is this: The courts will presume that an act regularly passed by the legislature is a valid law, and they will not declare it unconstitutional unless it is clearly shown to be so. * * *

"The other principle is this: The courts will not take evidence as to the unconstitutionality of a legislative act, but will determine its constitutionality or unconstitutionality from matters that appear on the face of the act itself or from facts of which the courts may take judicial notice. * * *

"Nothing appears on the face of the act under consideration to indicate, or even suggest, that it is unconstitutional, and there are no facts supplied by judicial notice to give it that effect. The act imposes upon

all utilities subject to regulation, with two exceptions, a fee, or tax, of one-tenth of one per cent of their gross operating revenues, the fees to be paid into the public service revolving fund. The two classes of excepted utilities are dealt with in other statutes similar in nature. * * *

"The purpose of the present act being, in our opinion, apparent on its face as one of regulation, and having been so judicially declared, it must be presumed that the legislature was in possession of advisory facts on which it proceeded when passing the act. It must further be presumed that, from the information possessed by it, the legislature concluded that the amount of the fees, as determined by the prescribed rates of percentage, was reasonably necessary to meet the cost of supervising and regulating the respective utilities. We are convinced that the act cannot be declared to be unconstitutional on its face or from facts of which the court can take judicial notice.

"Respondent's second contention is that the invalidity of the act was established by the evidence produced upon the trial. Respondent's contention upon this phase of the case, as we understand it, is that evidence is admissible not so much for the purpose of showing that an act is unconstitutional in its inception, or upon its face, but rather to show that the act has become invalid because of its intentional result or by its operative effect.

"There is eminent authority supporting the principle upon which that contention is based. * * *

"* * *

"But assuming that the principle just adverted to has legal acceptance and that there are instances in which it may properly be applied, we apprehend that this case was not submitted to the court, nor decided by it, upon that theory; and if it was, then we are further convinced that the evidence neither compels nor warrants a finding of invalidity of the act because of the result intended by the legislature or because of the operative effect of the act.

"The record reveals that the court, at the conclusion of the trial, was of the view that the question was entirely one of law, and that the evidence, as submitted, was immaterial and irrelevant. That was the position taken by appellant's counsel from the beginning, and respondent's counsel appear to have finally conceded the point. In the progress of the trial, however, the court admitted the evidence for the purpose of completing the record, so to speak, and to obviate the possible necessity of being required to take evidence later on because of an adverse decision, on appeal, on the question of law.

"Although the court did make findings based on such evidence, from which certain conclusions were drawn, and upon which the judgment as entered was based, yet, as already stated, the court considered the question as essentially one of law and not one of fact, nor even as one of mixed law and fact. If we should likewise consider the matter as being solely one of law, then what we have already stated would necessarily dispose of this case, on the ground that the 1929 act is not unconstitutional on its face, nor to be declared so from facts of which we may take judicial knowledge. However, since the record presents the case as one having a factual angle, we shall, for the purpose of the argument, consider that phase of it and express our view thereon.

"This is a law action. The material allegations of the complaint were denied by the answer. The burden of proof, therefore, rested on the plaintiff, who is the respondent here. The evidence consisted entirely of documentary records and the testimony of one witness, the auditor of the department of public works. The documentary records consisted almost entirely of the annual reports of the department to the governor. Those reports gave a resume of the activities of the department and the expenses incident thereto. It is true that the reports did not show that the total amount of the expenses incurred was allocated to the respective classes of utilities in proportion to the cost

of supervising and regulating each class; on the contrary, so far as is shown by the reports, all expenses of supervising and regulating the utilities, generally, were paid, as required, from the public service revolving fund, into which the fees collected from the several utilities had been deposited. But the reports did show that a vast amount of supervision and regulation was necessary and had been done with respect to railroads, as well as the other and unrelated utilities.

"The real controversy on the question of fact in the case was whether one-tenth of one per cent of the gross revenues of the railroads, from intrastate commerce, was more than was reasonably necessary to cover the cost and expense of railroad supervision and regulation. From what appears in the reports it could not be said dogmatically that the rate of percentage prescribed by the act was unnecessarily excessive. Indeed, it is contended by the respondent, and so found by the court, that, inasmuch as the department was not required by law to keep, and in fact did not keep, an account of the expense of regulating and supervising railroads, separate and apart from the expense of supervising and regulating other public utilities, it was practically impossible at the time of the trial to make any intelligible segregation. But the difficulty attendant upon meeting the burden of proof does not obviate the necessity of it. The burden rested upon and remained with the respondent and did not, because of its difficulty, shift to the appellant. Not having met the burden imposed upon it, the respondent did not make a case for relief.

"But, going even beyond that, the auditor testified that for years he has kept an account which showed that the cost of supervising and regulating the railroads of the state far exceeded the amount of the fees imposed upon them by the act. While the account kept by the auditor was not official, in the sense that, of itself, it was admissible in evidence, yet what the auditor did in that respect qualified him to testify as to the ultimate fact. Without further detailing the evi-

dence, we will say that; in our opinion, and in so far as there was any evidence on the subject, it preponderated against the findings made by the court as to the cost of supervising and regulating railroads.

"The mainspring of respondent's contention upon the immediate point is that many of the activities of the department are not supervisory or regulatory in nature, but are administrative or judicial in character, and that the utilities cannot be required to pay fees which are used, in part, to carry on these latter functions. It may be admitted that, if taxes, or fees, should be levied to pay for services in no way connected with public utilities, and at the same time such utilities were subjected to direct taxation upon their properties for such purposes equally with other corporations, while the other corporations were not required to pay the prescribed taxes, or fees, then there would be just ground for complaint of unlawful discrimination against such public utilities. But that is not the case here.

"Respondent takes altogether too narrow a view of the scope and purview of a supervisory or regulatory act, such as the one in question. The purpose of the act is not limited to mere *inspection* of railroad property, but is a much broader and more comprehensive one. Though railroads are private corporations, their uses are public. They exist for the convenience of the people in various kinds of transportation. They are given certain special privileges to be exercised in the interest of the public, and, to guarantee their performance, the railroads, like other public utilities, are made subject to regulation. Such regulation extends not only to matters affecting safety in transportation of passengers and freight, but also to matters affecting adequacy of transportation and reasonableness of rates.

"In the very nature and necessity of things, such regulation must have a broad field, the extent of which must be determined by legislative discretion. The power of regulation conferred upon the department of

public works must be commensurate with the duties to be performed and the purposes to be lawfully effected. When the interests of the public and of individuals or corporations are blended in a service imposed by law, it is a matter of legislative discretion to determine who shall bear the cost and in what proportions.

* * *

"In the case now before us, the activities of the department with respect to railroads were, in our opinion, clearly within the field of proper supervision and regulation. * * *".

The final judgment of the Supreme Court of the State of Washington was entered on the 3rd day of March, 1936.

E.

Cases Believed to Sustain the Jurisdiction.

The following cases are believed to sustain the jurisdiction of this Court:

Great Northern Ry. Co. v. *State of Minnesota*, 278 U. S. 503;

King Manufacturing Co. v. *City Council of Augusta*, 277 U. S. 100;

Sultan Ry. Co. v. *Department of Labor*, 277 U. S. 135;

Bryant v. *Zimmerman*, 278 U. S. 63, 67;

Puget Sound Power & Light Co. v. *City of Seattle*, 291 U. S. 619;

Pacific Telephone & Telegraph Co. v. *City of Seattle*, 291 U. S. 300;

Weston v. *City Council of Charleston*, 27 U. S. 449, 2 Pet. 449.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code.

Respectfully submitted,

F. G. Dorety,
Thomas Balmer,
Edwin C. Matthias,
Attorneys for Appellant.

(7633-C)

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1935

No. [redacted] 20

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

Appeal From the Supreme Court of the State of Washington

(184 Wash. 648, 52 Pac. (2d) 1274)

Brief of Appellant

F. G. DORETY,
1120 Great Northern Bldg.,
St. Paul, Minn.

L. B. daPONTE,
909 Smith Tower,
Seattle, Washington.

THOMAS BALMER,

EDWIN C. MATTHIAS,
404 Union Street,
Seattle, Washington,
Counsel for Appellant.

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ARGUMENT 21

I. Chapter 107, Laws of 1929, violates Section 8, Article I, and the equal protection and due process clauses of the Fourteenth Amendment to the Federal Constitution and is void on its face, because:

(a) The tax is not imposed for nor limited by the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies and many unrelated utility companies to pay the expenses incurred by the Department in regulating them all, in the aggregate; and 21-34

(b) The tax is imposed on railroad companies and a variety of other unrelated utility companies to pay the expenses of all of the duties and activities of the Department of Public Works, whether regulatory and supervisory in their nature, or administrative, police or judicial, and whether or not such activities have any relation to the business of the respective taxpayers. 35-39

II. The Act is void because its operative effect upon the appellant has been to create a commingled fund from the fees paid by railroads and other public utility corporations and other receipts of the Department, far in excess of the expenditures of the Department, and to make it impossible to determine the expense of regulating and supervising railroads separately from the expense of regulating and supervising other public utilities, or separately from the expense of the non-regulatory activities of the Department concerning railroads.

(a) The burden of proof was on the State to show that the fees collected from the railway companies under the act were not in excess of the reasonable cost of their regulation and supervision;

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(b) This burden of proof was not met because the only competent evidence in the record, consisting of the official reports of the Department of Public Works and the Governor of the State, shows that a large surplus was collected by the Department under the act and from other sources provided by law and commingled in one common fund, so that it was impossible to determine the expense of regulating and supervising railroads; 49

(c) The only evidence opposing this conclusion was that of the Auditor of the Department of Public Works, which was inadmissible and incompetent under all rules of evidence and was so held by both the trial court and the State Supreme Court, but was nevertheless made the basis of the State Supreme Court's holding "that the evidence preponderated against the findings made by the trial court" as to the cost of supervising and regulating railroads;

(d) This court will examine the State Supreme Court's finding to see whether it has substantial support in the evidence. So examined it discloses the lack of any support whatsoever. 54-56

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Supreme Court of the United States

OCTOBER TERM, 1935

No. 878

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

Appeal From the Supreme Court of the State of Washington

(184 Wash. 648, 52 Pac. (2d) 1274)

Brief of Appellant

STATEMENT OF THE CASE

This is an action by the appellant Railway Company to recover an alleged excess of fees exacted by the State and paid under protest by the appellant to the State Department of Public Works, sometimes called the Public Service Commission. Upon a trial by the court findings of fact and conclusions of law were made, based upon which the court entered judg-

ment for appellant. Upon appeal to the Supreme Court of the state this judgment was reversed (184 Wash. 648, 52 Pac. (2d) 1274), and petition for rehearing was denied. (Tr. 85-101.)

The statute of the State of Washington, the validity of which is involved in this case, is Chapter 107, Washington Session Laws of 1929 (Remington's Revised Statutes, Section 10417). The pertinent provisions thereof are:

"Chapter 107.

(H. B. 200.)

Fees Required of Public Utility Companies.

AN ACT relating to public utility companies, providing for increased fees and amending Section 1 of Chapter 113 of the Laws of 1921, as amended by Section 1 of Chapter 107 of the Laws of 1923 (Section 10417 of Remington's Compiled Statutes).

Be it enacted by the Legislature of the State of Washington:

Section 1. That section 1 of Chapter 113 of the Laws of 1921, as amended by section 1 of chapter 107 of the Laws of 1923 (section 10417 of Remington's Compiled Statutes) be amended to read as follows:

Section 1. That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under chapter 248 of the Laws of 1927, shall, on or before the first day of April of each year, file with the department of public works a

statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue: *Provided*, That the fee so paid shall in no case be less than ten dollars."

Section 2 of Chapter 113, Laws of 1921, which remained in effect with the foregoing amendment of Section 1, reads as follows:

"Sec. 2. All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the State treasurer, and by him deposited in a fund to be known as the public service revolving fund."

On March 9th, 1934, appellant Great Northern Railway Company, a corporation, filed its amended complaint in the Superior Court of Thurston County, Washington, to recover from the State of Washington the annual fees paid under protest to the Department of Public Works of Washington under Chapter 107, Laws of 1929, for the calendar years 1929 to 1932, inclusive. At the trial it was stipulated that the fee for the year 1933, which was also paid under protest, should be included in the action. The amended complaint also attacked the fees payable to the Department of Public Works under Chapter 113, Laws 1921, as amended by Chapter 107, Laws 1923, and to the Secretary of State under Chapter 227, Laws 1929, but at the trial the appellant did not question

the validity of those statutes. The issue was thus limited to the constitutionality of Chapter 107, Laws of 1929.

The amended complaint demanded a money judgment of $24,162.80, the total annual fees paid by appellant under Chapter 107, Laws 1929, for the calendar years 1929 to 1932, inclusive, together with interest; the amendment made by stipulation at the trial increased the amount demanded by $3,137.05, the fee paid by appellant for the calendar year 1933, together with interest; but by the withdrawal by appellant of its attack upon the prior statutes, the amount in controversy was reduced to $20,946.97 for the five calendar years 1929 to 1933, inclusive, plus interest, a total of $25,466.47. Appellant was granted judgment for this amount, together with its costs, against appellee in the Superior Court of the State of Washington for Thurston County on the first day of April, 1935. (Tr. 54.)

The amended complaint attacked Chapter 107, Laws of 1929, whether considered as imposing an occupation or excise tax or as imposing an inspection or regulatory fee. After the commencement of the suit the Supreme Court of the State held that the act imposes a regulatory or inspection fee, not an occupation or excise tax. See *Pacific T. & T. Co. v. Seattle*, 172 Wash. 649, 21 Pac. (2d) 721, affirmed

291 U. S. 300. In that case it was also held by the State Supreme Court that the fund created by the fees paid under Chapter 107, Laws 1929, is solely for the purpose of defraying the expenses attendant upon the administration of the Public Service Commission law of the State. In view of this holding, which defined the fee under attack as one to pay the expense of regulation and supervision, many of the allegations of the amended complaint became irrelevant.

Paragraph XV of appellant's amended complaint (first cause of action), however, is especially directed to the point that the act is invalid as an inspection or regulatory fee. This paragraph alleges:

"XV.

Under the Public Service Commission Law (Chapter 117, Session Laws 1911, Sections 10339 to 10490, inclusive, R. C. S., as amended) and under other laws of this state, the Department of Public Works exercises jurisdiction over and supervision of many classes of public utilities, including common carriers by rail, railroads operated by electricity, street railways, gas, electrical and water companies, telegraph and telephone companies, wharfingers and warehousemen, carriers by water, and many other activities wholly disconnected from and unrelated to its duties of inspection and supervision of common carriers by railroad, and is charged with the performance of a variety of duties, other than those pertaining to inspection and supervision of common carriers by railroad under the police power of the state. If Chapter 113, Session Laws of 1921, Chapter 107, Session Laws

of 1923, and Chapter 107, Session Laws of 1929, or any of them, be construed as imposing a fee for supervision and inspection, then said statutes, and each of them, do not restrict the fee to be paid by plaintiff or other common carriers by rail, to the cost of legitimate regulation or supervision, nor is such fee based upon the proper cost or expense thereof, but the same is a flat fee of a percentage of gross revenue levied upon carriers by rail, and other corporations, for the purpose of paying the expense of supervising and inspecting a variety of independent and unrelated corporations, as above alleged, and for the purpose of paying the expense of performance of a variety of unrelated duties, including the expense of performing duties and discharging functions which properly pertain to inspection, supervision and regulation, and many expenses of performing duties and discharging functions, such as business and policing expenses, the expense whereof cannot be imposed upon common carriers by rail, including plaintiff, as legitimate expenses of supervising, inspecting and regulating such common carriers by rail. The fee or tax provided by said Chapter 107, Session Laws of 1929, and the other statutes hereinbefore mentioned, is grossly in excess of the reasonable cost of inspection and supervision of common carriers by rail. Plaintiff is informed and believes, and alleges that there has been accumulated from the fees paid under said acts, up to and including the first of January, 1933, the sum of more than $250,000 in excess of the amount expended by the Department of Public Works in the discharge of its manifold duties and functions under the laws of this state. Said fee or tax is not a reasonable or legitimate inspection or supervision fee or tax, but said statutes, and each of them, are in truth and in fact, revenue measures. The taxes imposed by and under said statutes are made payable into the public service revolving fund, which fund is a general state fund, subject to withdrawal for various and sundry expenses of the state, and not solely de-

voted by law to the expense incurred by the Department of Public Works in the performance of its duties of inspection or supervision of common carriers by rail, or other corporations or businesses subject to its jurisdiction. Said fee or tax, if construed to be a supervision or inspection fee or tax, is, and constitutes a burden on, and regulation of, interstate commerce in violation of Section 8, Article 1 of the Constitution of the United States, is capricious, arbitrary, excessive and unreasonable, and is discriminatory and unequal, denies to plaintiff the equal protection of the laws, and deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 3 and 12, and Article VII, Sections 1, 2 and 3 of the State Constitution." (Tr. 12-14.)

Appellee's answer admitted the payment by appellant of the annual fees under protest; admitted "that the Department of Public Works exercises jurisdiction and supervision over many classes of public utilities including common carriers in the State of Washington, and that property belonging to plaintiff in the State of Washington is assessed upon an *ad valorem* basis for taxation like other property within the State;" admitted appellant's corporate status and capacity to sue, but denied substantially all other allegations of the amended complaint. (Tr. 34, 35.)

The trial court made detailed findings of fact and conclusions of law. (Tr. 37-54.) The trial court's findings show that, under the public service commission law and other laws, the Department of Public

Works exercises jurisdiction over many classes of public utilities, including common carriers by rail, electric and street railways, gas, electrical and water companies, telegraph and telephone companies, wharfingers and warehousemen, and carriers by water, with respect to which it exercises many regulatory and supervisory duties; that the Department also has many other important duties wholly unrelated to its duties of inspection and supervision of railroads and other utilities, including the duty, prescribed by Sec. 10394, Remington's Revised Statutes, to take part in litigation before the Interstate Commerce Commission with respect to interstate rates; that the Department is constantly engaged in such litigation and incurs large expense, as may be seen from its annual reports in evidence; that the Department takes sides and participates in such litigation, sometimes on the side of the carriers operating in this State, and at other times against them, and sometimes in favor of some carriers in the State and against others operating in the State; that under Sections 10433 and 10434, Remington's Revised Statutes, the Department acts judicially in ordering refunds of alleged overcharges—a prolific source of litigation and expense, as may be seen from the annual reports; that Section 10442, Remington's Revised Statutes, provides for litigation to enforce the orders of the De-

partment, which is also a source of considerable expense; that in none of these activities does the Department exercise supervisory or regulatory authority of which the cost can be charged to railroads. (Tr. 45-48.)

A summary of the principal statutes prescribing the duties of the Department is printed herein as Appendix A.

The trial court further found that upon taking effect of Chapter 107, Laws 1929, the legislature made no further appropriation for the expenses of the Department's activities from the general fund until 1933; that all expenses of the Department's activities during this period were paid only from the fees paid under Chapter 107, Laws 1929, and the fees imposed upon other businesses subject to the jurisdiction of the Department; that the accumulation of the Department's receipts over the period 1929 to 1933, inclusive, resulted in a surplus of $224,193.95 in the Department's fund at the end of 1933; that the receipts of the Department from all sources were in excess of its expenditures during that period by said amount; that, however, no separate accounts were kept or required to be kept, and it was therefore impossible to determine the expense of regulating and supervising railroads separately from the expense

of regulating and supervising other public utilities. But the court found that the activities of the Department connected with the regulation and supervision of railroads were at all times relatively unimportant, in comparison with the time devoted to, and the cost incurred by, the Department in regulating and supervising auto transportation companies and motor vehicle operations, and its activities relating to and expenses incurred in the regulation and supervision of telephone, electrical, gas, water and public utility corporations, other than railroads, and in its non-regulatory activities relating to railroads. The court further found that the above mentioned surplus of $224,193.95, accumulated between 1929 and 1933, was expended by the Department in 1934 in carrying on investigations of, and litigation with, public utility corporations other than railroads. (Findings VIII and XI, Tr. 45, 48-49.)

Appellant's main contention in the Supreme Court of the State of Washington was that Chapter 107, Laws of 1929, is void on its face (1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expense of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed,

both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties and activities of the Department of Public Works which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

The Washington Supreme Court overruled this contention on the stated ground that nothing appears on the face of the act to indicate that it is unconstitutional and that it "must * * * be presumed that from the information possessed by it, the legislature concluded that the amount of the fees as determined by the prescribed rates of percentage was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

The court next considered respondent's second contention that the invalidity of the act was established by evidence of its practical operation. It held that the burden of proof was on the appellant to show that the fees collected from the railroads under the act exceeded the cost of their regulation and supervision. It stated that a vast amount of supervision and regulation was necessary. But it made no refer-

ence to appellant's principal contention on this feature, viz., that the expense incurred in relation to railroads was largely of a non-regulatory character, such as conducting litigation before the Interstate Commerce Commission in the interest of shippers of the State of Washington, hearing reparation claims and other matters. The findings of the trial court go into these features in detail. They show that the Department performs many "duties and functions relating to railroads of a non-supervisory and non-regulatory nature." The Washington Supreme Court made no segregation of the cost of these activities from the cost of proper supervisory activities, but contented itself with the general holding that "in the very nature and necessity of things such regulation must have a broad field, the extent of which must be determined by legislative discretion."

Finally, the Washington Supreme Court held that even if the State had the burden of proving that the fees collected from the railroads of the state under Chapter 107, Laws of 1929, did not exceed the cost of their proper supervision and regulation, the evidence preponderated against the findings made by the trial court as to the cost of supervising and regulating railroads. The findings of the trial court were based upon the annual reports of the Department of Public Works, made to the Governor as required by

law. The evidence held by the Supreme Court to preponderate against these findings was that of the Auditor of the Department of Public Works, who testified that at his personal request, and not as a matter of official duty, the various employes of the Department handed him time slips, showing the estimated time they devoted each month to the respective classes of utilities, and that this apportionment showed that the cost of "the railroad part of the Department of Public Works" exceeded the amount of the fees imposed upon the railroads by the act of 1929. The time slips turned in monthly by the employes "took no account of the kind of work they were doing as to the regulation of railroads." It was admitted that these records were "not official in the sense of any rule or order of the Department that required them to be kept." The Auditor confessedly had no knowledge of his own whether the figures turned in by the employes were correct (Tr. 76). The evidence of the Auditor was admitted after the case had been reopened to permit its introduction, and over appellant's objection that the evidence was hearsay (Tr. 74.) The trial court viewed the evidence as immaterial but admitted it because he "didn't want the case to come back here." The State Supreme Court held that "while the account kept by the Auditor was not official, in the sense that, of itself, it was admissible in

evidence, yet what the Auditor did in that respect qualified him to testify as to the ultimate fact." (Tr. 104-106.)

While the State Supreme Court disagreed with the trial court's legal conclusions, it did not disagree with the trial court's findings of fact, except in the general holding that "without further detailing the evidence, we will say that in our opinion, and insofar as there was any evidence on the subject, it preponderated against the findings made by the court as to the cost of supervising and regulating railroads." (Tr. 91.)

SPECIFICATION OF ERRORS RELIED UPON

(1) The Supreme Court of the State of Washington erred in overruling appellant's contention that Chapter 107, Laws of 1929, is void on its face (1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties

and activities of the department which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

(2) The Supreme Court of the State of Washington erred in holding that nothing appears on the face of the act to indicate that it is unconstitutional, and that it must "be presumed that, from the information possessed by it, the legislature concluded that the amount of the fees, as determined by the prescribed rates of percentage, was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

(3) The Supreme Court of the State of Washington erred in holding that although Chapter 107, Laws of 1929, imposes a flat fee on railroad companies and many unrelated utility companies as well, to pay the expenses of regulating them all in the aggregate, and also the expenses of any and all duties and activities of the Department in connection with railroads and other utility companies,—many of which are not of a regulatory or supervisory nature,—the burden of proof was on the appellant to show that the fees collected from the railroads exceeded the cost of their regulation.

(4) The Supreme Court of the State of Washington erred in holding and deciding that the evidence preponderated against the findings made by the trial court as to the cost of supervising and regulating railroads, viz:

(a) that it is not, and has not been, possible to separate and compute the cost of performance by the Department of Public Works of its supervisory and regulatory duties relating to railroads from the cost and expense of its supervisory and regulatory duties relating to telephone and telegraph, electrical, water, gas and other public utility corporations; (Finding of Fact IX).

(b) that in addition to its supervisory and regulatory duties relating to railroads said Department is required by law to perform various other duties and functions relating to railroads of a non-supervisory and non-regulatory nature; in particular, the Department has the duty of prosecuting or defending various rate cases before the Interstate Commerce Commission relating to rates of interstate railroads and to rates of railroads operating in other states and not subject to its jurisdiction; that the Department incurred a large expense in said non-regulatory and non-supervisory activities, but no account is required to be kept or was kept of the amount thereof and it is

impossible to determine the same, and no attempt was made to do so on the trial of this case; (Finding of Fact X).

(c) that the Department of Public Works has also undertaken to act in a judicial capacity in overcharge and reparation cases filed in that department by shippers against railroads, including plaintiff, and has held hearings, taken testimony, and made and entered awards in many of such cases in favor of the shippers and against the railroads, including plaintiff; that the Department incurred a large expense in said overcharge and reparation cases, but no account is required to be kept or was kept of the amount thereof, and it is not only impossible to determine the cost of such cases to the Department, but no attempt was made to do so in the trial of this case; (Finding of Fact X-B).

(d) that said Chapter 107, Laws of 1929, and the fee imposed thereby on railroad companies, including plaintiff, is in fact a revenue measure intended to impose, and which does impose, upon railroads and other utility corporations the cost and expense of regulating and supervising railroads and other utility corporations, and to defray the cost and expense of all of the activities of the Department, whether or not of a regulatory and supervisory nature, and the

excess collected over expenditures reverts to and is a part of the general funds of the state. (Finding of Fact XII.)

(5) The Supreme Court of the State of Washington erred in ignoring the uncontradicted evidence that the expense incurred by the Department of Public Works in relation to railroads, and defrayed by the fees imposed upon appellant and other railroads by Chapter 107, Laws of 1929, is largely caused by activities of a non-regulatory character, the expense of which has not been and cannot be segregated or determined.

(6) The Supreme Court of the State of Washington erred in considering and in basing its decision upon the evidence of the Auditor of the Department of Public Works as to the expense incurred by the Department in supervising and regulating railroads, since such evidence was pure hearsay and was inadmissible for the purpose of determining the rights asserted by the appellant under the Federal Constitution.

(7) The Supreme Court of the State of Washington for each of the reasons contained in the foregoing assignments, erred in reversing the judgment of the Superior Court of Thurston County, and in directing that appellant's action against the appellee be dismissed. (Tr. 106-109.)

SUMMARY OF ARGUMENT

I.

Chapter 107, Laws of 1929, violates Section 8, Article I, and the equal protection and due process clauses of the Fourteenth Amendment to the Federal Constitution and is void on its face, because:

(a) The tax is not imposed for nor limited by the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies and many unrelated utility companies to pay the expenses incurred by the Department in regulating them all, in the aggregate; and

(b) The tax is imposed on railroad companies and a variety of other unrelated utility companies to pay the expenses of all of the duties and activities of the Department of Public Works, whether regulatory and supervisory in their nature, or administrative, police or judicial, and whether or not such activities have any relation to the business of the respective taxpayers.

II.

The Act is void because its operative effect upon the appellant has been to create a commingled fund from the fees paid by railroads and other public utility corporations and other receipts of the Depart-

ment, far in excess of the expenditures of the Department, and to make it impossible to determine the expense of regulating and supervising railroads separately from the expense of regulating and supervising other public utilities, or separately from the expense of the non-regulatory activities of the Department concerning railroads.

(a) The burden of proof was on the State to show that the fees collected from the railway companies under the act were not in excess of the reasonable cost of their regulation and supervision;

(b) This burden of proof was not met because the only competent evidence in the record, consisting of the official reports of the Department of Public Works and the Governor of the State, shows that a large surplus was collected by the Department under the act and from other sources provided by law and commingled in one common fund, so that it was impossible to determine the expense of regulating and supervising railroads;

(c) The only evidence opposing this conclusion was that of the Auditor of the Department of Public Works, which was inadmissible and incompetent under all rules of evidence and was so held by both the

trial court and the State Supreme Court, but was nevertheless made the basis of the State Supreme Court's holding "that the evidence preponderated against the findings made by the trial court" as to the cost of supervising and regulating railroads;

(d) This court will examine the State Supreme Court's finding to see whether it has substantial support in the evidence. So examined it discloses the lack of any support whatsoever.

ARGUMENT

I.

Chapter 107, Laws of 1929, violates Section 8, Article I, and the equal protection and due process clauses of the Fourteenth Amendment to the Federal Constitution and is void on its face, because:

(a) The tax is not imposed for nor limited by the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies and many unrelated utility companies to pay the expenses incurred by the Department in regulating them all, in the aggregate; and

(b) The tax is imposed on railroad companies and a variety of other unrelated utility companies to pay the expenses of all of the duties and activities of the Department of Public Works, whether regulatory and supervisory in their nature, or administrative, police or judicial, and whether or not such activities have any relation to the business of the respective taxpayers.

Chapter 107, Laws of 1929, consists of but one section and requires every corporation, etc., "engaged in business as a public utility and subject to regulation as to rates and charges by the Department of Public Works, except auto transportation and steamboat companies holding certificates under Chapter 248, Laws of 1927," to file with the Department on or before April 1st annually a sworn statement showing its gross operating revenue for the preceding calendar year and pay to the Department a fee of 1/10 of 1% thereof.

Section 2 of Chapter 113, Laws of 1921, provides that all sums collected by the Director of Public Works under the provisions of the act shall be paid to the State Treasurer and by him deposited in a fund to be known as the "Public Service Revolving Fund."

Sec. 10344 of the public service commission law defines the terms used in Chapter 107. The term "public service company" is defined as follows:

"Every common carrier, gas company, electrical company, water company, telephone company, telegraph company, wharfinger and warehouseman as such terms are defined in this section."

"Common carriers" are defined as:

"All railroads, railroad companies; street railroads, street railroad companies, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies, and every corporation, etc., operating, etc., any such agency for public use in the conveyance of persons or property for hire within this state."

Each of the enumerated companies is required to pay 1/10 of 1% of annual gross revenue to the State Treasurer by him to be paid into the public service revolving fund. The revolving fund is a general state fund subject to appropriation by the legislature for any and all purposes, although customarily appropriations for support of the Department's manifold activities are made from that fund in a lump sum "*not to exceed* fees heretofore or hereafter collected" and paid into the revolving fund. See Laws 1931, Chapter 144, page 466, and Laws 1933, Chapter 192, page 903, Appendix B.

The duties of the Department of Public Works are described in Findings III (Tr. 39, 40), X (Tr. 46, 47) and X-B (Tr. 47, 48), as follows:

"III.

The Department of Public Works of Washington is an administrative tribunal, with three members, namely, a director and two supervisors, with the usual powers of regulation and supervision of railroads and other public utilities, and is charged with the performance of a variety of duties, other than

those pertaining to railroads and utilities. It is divided into two divisions, known as the 'Division of Transportation' and 'Division of Public Utilities'. The Division of Transportation is under a "Supervisor of Transportation' and the Division of Public Utilities is under a 'Supervisor of Public Utilities'. The Director of the Department has general supervision of all its activities. The Supervisor of Transportation is concerned specially with railroads, water carriers, street railways and other transportation agencies. The Supervisor of Public Utilities is concerned specially with telephone and telegraph companies, electrical companies, gas companies and other public utilities.

"The jurisdiction of the Department of Public Works is summarized in its Annual Report to the Governor for the period ending December 1, 1932, to November 30, 1933, introduced in evidence in this case on page 5 thereof, as follows:

" 'Jurisdiction of Department

The regulatory powers of the State of Washington are exercised over telephone and telegraph companies, light and power companies, water and irrigation companies, gas companies, docks, warehouses, ferries and other water, freight and transportation companies, railroads, street railways, auto, passenger and freight transportation companies and all trucks engaged in transporting property outside city limits for compensation, or sold or to be sold in the performance of a commercial enterprise, or for lease, rent or bail. In addition the Department has jurisdiction over railroad crossings and the inspection of railroad scales'."

"X.

In addition to its supervisory and regulatory duties relating to railroads said Department is required by law to perform various other duties and functions

relating to railroads of a non-supervisory and non-regulatory nature; in particular, the Department has the duty of prosecuting or defending various rate cases before the Interstate Commerce Commission relating to rates of interstate railroads and to rates of railroads operating in other states and not subject to its jurisdiction. It pays all of its expenses incurred in the discharge of those functions and duties out of said filing or report fees paid by railroad companies and public utilities. Shippers and the public generally who are parties to or are or may be benefited by said proceedings before the Interstate Commerce Commission pay no portion of the expenses of said proceedings and no fee or tax is imposed upon them for that purpose, although all such parties, including plaintiff, are taxed on their property upon an ad valorem basis to defray governmental expenses. The following is quoted from page 1 of the Department's report to the Governor for the year 1930 and is illustrative of its functions in this particular, to-wit:

"'An important part of the duties of the Department of Public Works is that of seeking relief before the Interstate Commerce Commission in matters of interstate rates where they adversely affect citizens of Washington. It also participates in other rate cases when the matter involves conditions or activities in this state. The Department during the past year participated in many proceedings before the Interstate Commerce Commission. The following include the more important matters with which it was engaged:'

"The report follows with the particulars of the activities of the Department in connection with matters pending before the Interstate Commerce Commission wherein it appeared and took part as a litigant and in an advisory capacity to the Interstate Commerce Commission, in some instances lining up on the same side as the railroads operating in this state, including plaintiff, in other instances taking the opposite

side, and in still others taking sides as between railroads operating in this state. In one case in particular before the Interstate Commerce Commission in which the Department of Public Works appeared on behalf of the State of Washington in a contested case which resulted in a lengthy hearing and later in proceedings in the courts was involved the question whether the Interstate Commerce Commission could order the construction of a cross-state railroad line in the states of Oregon and Idaho. (See pp. 4 and 6 of 1929 and 1930 Annual Reports of Department, introduced in evidence as Exhibits 9 and 8, respectively, under title on said pages 'Railroad Extension Between Homestead, Oregon, and Lewiston, Idaho.') The Department incurred a large expense in said non-regulatory and non-supervisory activities, but no account is required to be kept or was kept of the amount thereof and it is impossible to determine the same, and no attempt was made to do so on the trial of this case."

"X-B:

The Department of Public Works has also undertaken to act in a judicial capacity in overcharge and reparation cases filed in that department by shippers against railroads, including plaintiff, and has held hearings, taken testimony and made and entered awards in many of such cases in favor of the shippers and against the railroads, including plaintiff. Said Department pays and has paid all of its expenses incurred in such reparation cases out of said Filing or Report Fees paid by the railroad companies and public utilities. In the year 1929, 14 of the formal proceedings before said Department were against railroads to recover on overcharge or reparation claims. In the year 1930 there were 22 such cases before the Department; in the year 1932 twenty; and in the year 1933, 30. (See pp. 3-16 of 1929 Annual Report, Exhibit 9; pp. 5-18 of 1930 Annual Report, Exhibit

8; pp. 22-36 of 1932 Annual Report, Exhibit 6, and pp. 13-42 of 1933 Annual Report, Exhibit 5.) The number of such cases for the year 1931 was substantially the same. Plaintiff's railroad is taxed in the State of Washington, and was so taxed during the years 1929 to 1933, inclusive, under and by virtue of Chapter 130, Washington Special Session Laws 1925, on its fair market value considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. During said years 1929 to 1933, inclusive, in addition to said ad valorem taxes, the plaintiff also paid said fees to the Department of Public Works under Chapter 107, Laws of 1923, while no such fees to the Department of Public Works were paid or are required to be paid by statute by said shippers who were parties to said overcharge and reparation proceedings. The Department incurred a large expense in said overcharge and reparation cases, but no account is required to be kept or was kept of the amount thereof, and it is not only impossible to determine the cost of such cases to the Department, but no attempt was made to do so in the trial of this case."

It is well settled, of course, that the state may impose on a railroad, or other utility corporation, the cost of its necessary regulation and supervision. It was so held in *Charlotte, etc., Railroad Company v. Gibbes*, 142 U. S. 386. In that case a statute of South Carolina created a railroad commission with the usual powers, and provided that the entire expense of the commission should be borne by the railroads of the state in proportion to gross revenue. The act was sustained on the theory that regulation was necessary

in the interest of the public and "when exercised through commissioners, their services are for the benefit of the railroad corporations as well as of the public." Where limited to the reasonable expense of proper supervision and regulation, there is "no encroachment upon the 14th Amendment." But it is otherwise if the tax should be levied to pay for services "in no way connected with the railroads," for, in that case, there would be a violation of due process of law, the railroads being otherwise taxed on the value of their property, as of course they are in Washington (Finding X, Tr. 48). The *Gibbes* case, while authority for upholding a tax on railroads to pay the cost of their regulation and supervision, is also authority for saying that a tax levied on railroads to defray the expense, in whole or in part, of regulating other unrelated corporations, violates the due process clause of the 14th Amendment.

The *Gibbes* case is followed in *New York v. Squire*, 145 U. S. 175, and the question was again before the court in *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, and *Postal Telegraph-Cable Co. v. New Hope*, 192 U. S. 55. In the *Philadelphia* case the city imposed a fee of $1.00 per pole and $2.50 per mile of wire to pay cost of inspection and brought action to recover. The court held that a city has power to require a reasonable fee for local supervision and in-

spection, but that the power must be exercised in reason and only a necessary charge imposed, and the amount must be limited to the cost of the particular service rendered, and the supervision must be regulatory in character. In *Postal Tel. Co. v. New Hope* the action was to recover certain inspection fees from the Telegraph Company. The ordinance was upheld, but because the jury returned a verdict for less than the amount provided, the judgment was reversed on the ground that the question was whether the fee imposed was reasonable; if not, the verdict should have been for defendant. Neither court nor jury, said this court, had a right to substitute its judgment as to what was reasonable and to give a verdict for that sum, as to do so would be an invasion of the legislative province.

The principle of all of the cases is that a corporation which so conducts its business as to require inspection and supervision may be charged with the cost thereof, but cannot be charged in excess of the cost, nor with the cost of regulating other and unrelated activities; nor with the cost of activities which are not of a regulatory or supervisory character, even though incidental to the regulated business.

Foote & Co. v. Stanley, 232 U. S. 494, is directly in point. That case condemns a Maryland statute providing for inspection of oysters and prescribing a fee

of 1c per bushel. The act provided that the fund should be drawn on "for the purpose of maintaining sufficient and proper police regulation for the protection of fish and oysters in Maryland waters, and in the payment of officers and men, and keeping in repair and supplying the necessary means of sailing the boats and vessels of the state fishery force."

Reversing the state court, this court held that inspection is usually intended to determine weight, quality, etc., and accomplished by weighing or looking at the articles, and then said:

"But while the two duties may sometimes overlap, there is a difference between policing and inspection, and if the state imposes upon one set of officers the performance of the two duties, and pays the whole or a part of the joint expenses out of inspection fees, it must be made to appear that such tax does not materially exceed the cost of inspection,—the burden in such cases being on those seeking to collect the combined charge. For if the cost of inspection is so intermingled with other expenses as to make it impossible to separate the two, interstate commerce might be burdened by fees collected both for inspection and revenue,—for a lawful and for an unlawful purpose."

So it is in the case at bar that the act imposes a flat fee of 1/10 of 1% of gross annual revenue on many unrelated corporations to pay the expense incurred by the Department in regulating all of them; and imposes a flat fee on all of the corporations for the purpose of defraying the cost incurred by the

Department in discharging its manifold duties, some of which are of a supervisory nature and many others of an administrative and judicial nature. With respect to many of these duties the Department does not discharge supervisory functions in so much that they might just as well be imposed upon some other state officer or department who has no duty whatever with respect to railroads and other utility corporations.

The opinion in the *Foote* case proceeds to point out that the statute imposes on the fishery force many duties with respect to patroling the waters and enforcing various police regulations, commingled with the duty of inspection, the expense whereof is to be paid out of the inspection fee. Therefore, says the court, the law is void on its face for raising more revenue than necessary for inspection:

"The unreasonableness of inspection fees may appear from the language of the act, as in D. E. Foote & Co. v. Clagett, 116 Md. 228, 81 Atl. 511, where a charge of 2 cents a bushel on oysters was collected, under a statute which provided that one-half was to be used for inspection and the other half was to be used for replacing shells on the natural beds for the purpose of increasing the oyster crop. That law was declared void by the court of appeals of Maryland, because of the provision that one half of the inspection fee should be applied to other than the inspection purpose. The present statute contains language susceptible of the same construction, for it provides for

an inspection fee of 1 cent per bushel to be 'levied to help pay the salary of the inspectors and the other expenses of the State Fishery Force.' "

The *Foote* case is cited and followed in *Lugo v. Suazo*, 59 Fed. (2d) 386, where the court of appeals for the first circuit invalidates a Puerto Rico act imposing on foreign coffee a fee of 2 cents a pound to be paid into the Insular Treasury as a "Coffee Protection Fund," devoted to defraying the expenses of enforcement of the law for protection of Puerto Rican coffee and for inspecting and guaranteeing the origin thereof. Citing and following the *Foote* case, the court recognizes two rules, stated in the first and second head notes as follows:

(1) Where inspection act fixes fees to cover only inspection expense, presumption is that fees are reasonable, and burden of showing contrary is on one asserting invalidity of act.

(2) Where alleged inspection statute directs that inspection fees shall be devoted to defraying other expenses as well as inspection expenses, presumption is that fees fixed are unreasonable and burden of establishing contrary is on one asserting validity of act.

The *Foote* and *Lugo* cases are in accordance with the general rule with respect to the burden of proof

in such cases, which is that while plaintiff, seeking recovery on the ground that a tax was excessive, must show the amount of taxes which he would have been obliged to pay had he been legally and properly assessed, that rule does not apply where the illegalities are such that it is impossible to ferret out the legal from the illegal taxes. Where the ground of the objection is that the tax was levied in part for an illegal object, it is not necessary for the plaintiff to show how much of the tax was applied to the illegal object. 61 Corpus Juris, Sec. 1243, page 1006; *Solomon v. Oscoda Township*, 77 Mich. 365, 43 N. W. 990; *Gillette v. Hartford*, 31 Conn. 351. In the *Solomon* case, *supra*, the Michigan court say:

"It is urged by defendant that the plaintiff should, but did not, show the excess of taxes which she would have been obliged to pay had she been legally and properly assessed. Such, undoubtedly, is the general rule, but where the illegalities are such that it is impossible to ferret out the legal from the illegal taxes which the tax-payer should pay, the rule does not apply."

State v. Standard Oil Co., 100 Neb. 826, 161 N. W. 537, considers a Nebraska statute providing for inspection of oil and fixing a fee of 10 cents per barrel. The oil inspection department was consolidated with the food, drug and dairy department, for which inspection fees were also imposed. The act was held a

violation of the state constitution, providing for equal taxation, and in violation of the federal constitution as well. The court said:

"Let us add that, while it is within the power of the state, for economy or other reasons, to consolidate departments, as was done here, the Legislature, in fixing its fees for inspection, should so fix them for each department or business that neither can complain that an unfair proportion of the burden of inspection is placed upon it. The guiding rule for the Legislature is to so exercise its discretionary power that the fee established in each business or occupation will, as near as may be, yield an amount not more than reasonably sufficient to pay the cost of inspection in such business or occupation."

The Washington Supreme Court held in the case at bar that nothing appears on the face of the act to indicate that it is unconstitutional, and that it must "be presumed that from the information possessed by it, the Legislature concluded that the amount of the fees as determined by the prescribed rates of percentage was reasonably necessary to meet the cost of supervising and regulating the respective utilities." This conclusion, we submit, is opposed to the decision of this court in *Foote & Co. v. Stanley*, 232 U. S. 494, *supra*. The holding in the *Foote* case clearly is that where a statute levies a flat tax to pay the cost of inspection—a legitimate purpose—and also to pay the cost of other services not in the nature of inspection, the act carries its own proof of invalidity.

The opinion of the Washington Supreme Court makes no reference to the appellant's contention that railroads are taxed by the act under review to defray expense incurred by the Department of Public Works for activities of a non-regulatory character in relation to railroads, such as conducting litigation before the Interstate Commerce Commission in the interest of the shippers of the state, hearing reparation claims and other matters. The findings of the trial court disclose these activities in detail. These findings, based upon the Department's Annual Reports, show that the Department has the duty of prosecuting and defending various rate cases before the Interstate Commerce Commission relating to rates of interstate railroads and to rates of railroads operating in other states and not subject to its jurisdiction; that the Department is required to act in a judiciary capacity in overcharge and reparation cases filed by shippers against railroads; and that the Department incurred large expenses in these activities (Findings X and X-B; Tr. 46-48).

The performance of judicial and administrative functions by the various departments of the state government is for the benefit of all the people of the state. The cost of performing such functions by one department cannot constitutionally be imposed upon a selected group of individuals or corporations which

are otherwise taxed like all other people of the state for the purpose of defraying such expenses. Reparation proceedings are judicial, not regulatory, in character. In appearing before the Interstate Commerce Commission the Department of Public Works is exercising an administrative function in the interest of the entire state. The Department recognizes this in its Annual Report to the Governor for the year 1930 (Exhibit 8, page 1):

"An important part of the duties of the Department of Public Works is that of seeking relief before the Interstate Commerce Commission in matters of interstate rates where they adversely affect citizens of Washington. It also participates in other than rate cases where the matter involves conditions or activities in this state. The Department during the past year participated in many such proceedings before the Interstate Commerce Commission." (Tr. 47.)

The Reports of the Department also show that it heard and decided numerous overcharge or reparation claims against railroads in the years 1929 to 1933, inclusive (Tr. 48).

With respect to the nature of reparation proceedings, this court in *Baer Bros. Mercantile Co. v. D. & R. G. R. Co.*, 233 U. S. 479, said:

"That the two subjects of reparation and rates may be dealt with in one order is undoubtedly true (citing cases). But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is

in its nature private and the other public. One is made by the Commission in its quasi judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi legislative capacity, to prevent future injury to the public."

A state law that imposes a fee upon the railroads, which is partly for the purpose of defraying the cost of judicial proceedings, which does not impose a similar fee upon other parties to such proceedings, while the railroads, like other corporations and individuals, are taxed upon their property upon an *ad valorem* basis, is counter to the Fourteenth Amendment to the Federal Constitution, in that it deprives the railroads of their property without due process of law, and denies to them the equal protection of the laws. This was decided in *Charlotte C. & A. R. Co. v. Gibbes*, 142 U. S. 386. The court said:

"If the tax were levied to pay for services in no way connected with the railroads, as for instance, to pay the salary of the executive or judicial officers of the state; while railroad corporations were at the same time subjected to taxation upon their property equally with other corporations for such expenses, and other corporations were not taxed for the salaries mentioned, there would be just ground of complaint of unlawful discrimination against the railroad corporations and of their not receiving the equal protection of the laws."

The fact that reparation proceedings result from the operation of railroads certainly does not justify imposing their expense upon the railroads alone, any

more than the cost of maintaining the courts of the state may be imposed exclusively upon the defendants sued therein. Such functions of government are for the benefit of the people as a whole, and the cost thereof must be charged to the people as a whole, or the uniformity clause of the Constitution is violated.

The Washington Supreme Court admits the force of appellant's contention, supported by the cases cited, when it says:

"The mainspring of respondent's contention upon the immediate point is that many of the activities of the department are not supervisory or regulatory in nature but are administrative or judicial in character, and that the utilities cannot be required to pay fees which are used in part to carry on these latter functions. It may be admitted that if taxes, or fees, should be levied to pay for services in no way connected with public utilities, and at the same time such utilities were subjected to direct taxation upon their properties for such purposes equally with other corporations, while the other corporations were not required to pay the prescribed taxes, or fees, then there would be just ground for complaint of unlawful discrimination against such public utilities. But that is not the case here." (Tr. 91, 92.)

The Washington court then proceeds to gloss over the point by merely holding that "in the very nature and necessity of things such regulation must have a broad field, the extent of which must be determined by legislative discretion." Then follows a quotation from *Charlotte C. & A. R. Co. v. Gibbes, supra.* But

we submit that it is of no aid to point out that regulation covers a broad field when, as here, it appears without contradiction that railroads are taxed for the performance of duties outside this admittedly broad field.

Neither does the Washington Court clearly meet appellant's contention that Chapter 107, Laws of 1929, is not imposed for, nor limited by the reasonable cost of supervising and regulating railroads, but is simply a flat fee imposed on railroads and many other unrelated utility companies to pay the expense of regulating them all in the aggregate.

While the State may impose upon a single tribunal a variety of functions, it must also provide that the tax imposed upon each business shall be devoted to supervision and regulation of that business and be not unreasonably in excess thereof. *Foote & Co. v. Stanley, supra.* Other cases, particularly *Mountain Timber Co. v. Washington,* 243 U. S. 219, affirming 75 Wash. 581, and cases in that category, are also in point. In the *Mountain Timber* case the state industrial insurance act was upheld against objection to distribution of cost by classes of industries, the court holding that industries were properly classified with reference to their risk, so that each unit should contribute its just proportion of the loss. But the court

carefully limits the liability of each classified unit to the losses occurring in its own class. It implies that one industry of a different class of risk cannot be required to pay expense of accidents in dissimilar industries. The court says:

> "In short, it cannot be deemed arbitrary or unreasonable for the state, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes *limited to the actual losses occurring in the respective classes of occupation.*" (Italics supplied.)

In other words, the logging industry is required to pay its losses, the construction industry its losses, railroads their losses, etc. The court says that special taxes for regulation and revenue in proportion to special injury attributable to the activities taxed, is not novel, citing the *Bank Guaranty* case, *sub nom. Noble v. Haskell*, 219 U. S. 104, and a number of other cases, including the *Gibbes* case. That the *Gibbes* case is cited in the *Mountain Timber* case proves that both cases rest upon the same principle.

In *State ex rel. Davis-Smith v. Clausen*, 65 Wash. 156, 117 Pac. 1101, the Washington Supreme Court gives many instances showing the principle upon which the validity of such statutes is founded. For example, the statute which provides for collection from vessels of 40 cents per month for each seaman,

to be used for the care of aged seamen; statutes making railroad corporations absolutely liable for fires they set; statutes making landlords liable for loss resulting from intoxication caused by the sale of liquor by lessees; statutes imposing liability upon fire insurance agents for the benefit of a fund to care for sick and injured firemen; and many others of like kind. All of these cases imply that the liability imposed must be on account of the injury or expense occasioned by the industry. No case has ever held that one industry may be held liable for expense occasioned by another industry; nor that oil may be taxed to pay the cost of inspecting hay or grain, and so with each industry or article requiring supervision, regulation or inspection in the public interest.

The *Mountain Timber* case is cited with approval in the *Railroad Retirement* case, decided by this court May 6, 1935, 55 Sup. Ct. Rep. 758. The Retirement Act provides a fund to be contributed by all of the railroad companies for pensioning all of the employes; that is to say, the employes of each company are treated as the employes of all, and the employes of all as the employes of each, without recognition of the different circumstances of each carrier and its employes. The Government cited *Mountain Tim-*

ber Co. v. Washington and *Noble v. Haskell*, and similar cases. The court distinguishes those cases, concluding as follows:

"We conclude that the provisions of the act which disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets, regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process."

If this be so, how much more flagrant is the violation of due process where railroads and many wholly unrelated corporations are grouped together and made jointly and severally responsible for the cost of regulating one another; and are also made liable for the non-supervisory expenses incidental to the Department's jurisdiction, and as well for expenses of activities which have no relation to any of them.

II.

The Act is void because its operative effect upon the appellant has been to create a commingled fund from the fees paid by railroads and other public utility corporations and other receipts of the Department, far in excess of the expenditures of the Department, and to make it impossible to determine the expense of regulating and supervising railroads separately from the expense of regulating and supervising other public utilities, or separately from the expense of the nonregulatory activities of the Department concerning railroads.

In addition to the fees paid under Chapter 107, Laws of 1929, by railroads and public utilities the Department of Public Works receives other fees. The following is a copy of a financial statement on page 79 of the Annual Report of the Department to the Governor for 1933 (Exhibit 5). It is typical of the other years:

"RECEIPTS

	Dec. 1, 1932 to Mar. 31, 1933	Apr. 1, 1933 to Nov. 30, 1933	Total Fiscal Year Ending Nov. 30, 1933
Auto Transportation, gross revenue fees	$ 11,979.37	$ 35,201.53	$ 47,180.90
Auto Transportation, application fees	110.00	1,566.00	1,676.00
Report filing fees	31,395.27	28,397.54	59,792.81
Motor Vehicle Permit, gross revenue fees		8,649.69	8,649.69
Motor Vehicle Permit, application fees		14,750.00	14,750.00
Motor Vehicle Permit, plate fees		6,133.00	6,133.00
Storage Warehouse, gross revenue fees		5.00	5.00
Storage Warehouse, application fees		1,130.00	1,130.00
Scale Test fees	200.00	1,800.00	2,000.00
Utility Overcharge fees	91.13	99.95	191.08
Miscellaneous Fees	701.96	1,739.92	2,441.88
Certified Boat fees	3,536.94	853.86	4,390.80
Special Case Cost fees		3,055.08	3,055.08
Totals	$ 48,014.67	$103,381.57	$151,396.24"

(Finding VII, Tr. 44.)

Prior to the enactment of Chapter 107, Laws of 1929, the cost of operation of the Department of Public Works was paid from three sources,—the general fund, the auto transportation fund and the public service revolving fund.

Thus the Appropriation Act of 1929 (Laws of 1929, ~~Chapter 201~~, Chapter 228, page 640; Appendix B) appropriated from the general fund $124,200 and from the public service revolving fund $188,750. Of course the fees provided by the Act of 1929 were not then available.

The Governor's message to the Legislature of 1929 (Exhibit 11) contained the following recommendation:

"PUBLIC WORKS.

"The cost of operation of the Department of Public Works is now paid from three sources—the general fund, the auto transportation fund, and the public service revolving fund. The motor vehicle division is entirely self-supporting, all expenses being paid from the auto transportation fund, derived from an assessment of one per cent of the gross earnings of all motor stage and freight lines. The *public utilities* and *transportation divisions* should likewise be *self-supporting*, and as to operating costs, the work of this department carried on as a unit.

"It is recommended that the fees now required of public utilities and transportation companies, other than motor, be sufficiently increased so that the department may carry on *all of its activities* without cost to the general taxpayers. It is further recommended that the auto transportation and public service revolving funds be abolished, and all receipts paid into the general fund. There is no more justification for setting up special funds in this department than for an insurance fund in the office of the Insurance Commissioner, a banking or savings and loan fund in the Department of Efficiency, or a lawyers', doc-

tors', or barbers' fund in the Department of Licenses." (Italics supplied.)

The Legislature adopted the Governor's recommendation and enacted the statute now under review. The result was in 1931 an appropriation of $272,000 from the revolving fund and no appropriation from the general fund (Laws 1931, Chapter 144, page 466; Appendix B).

In 1933 there was again no appropriation from the general fund, but there was sufficient in the revolving fund for the Legislature to appropriate therefrom for salaries, wages and operations of the Department $180,850, and for "special investigation and valuation " $250,000 (Laws 1933, Chapter 192, page 903; Appendix B).

The occasion of the appropriation for "special investigation and valuation" was the passage of three drastic statutes by the 1933 Legislature for the additional supervision, regulation and dictation of the business of power companies, telephone companies and other utilities, excluding interstate railroads (Laws 1933, Chapters 151, 152 and 165).

The accumulation of the amounts paid by railroads and other public utility corporations and other receipts of the Department over the period 1929 to 1933, inclusive, is shown in the Annual Reports of

the Department to the Governor (Exhibits 5, 6, 7, 8, 9 and 13). At the end of 1933, as shown on page 79 of Exhibit 5, there was a surplus in the Department's fund amounting to $224,193.95. This balance was expended by the Department in 1934 in carrying on investigations of and litigation with public utility corporations other than railroads, and with which the railroads were in no way concerned, as clearly appears from the Department's report to the Governor for 1934 (Exhibit 13). In this report the Department said on page 11:

"PENDING INVESTIGATIONS

"The 1933 Session of the Legislature made available to the Department a special appropriation of $250,000 for utility rate and valuation investigations. A large number of these investigations have been taken, and all thereof except those involving the two larger telephone companies and the three larger power companies have been completed, except for the entry of findings and orders in some thereof. These cases have disclosed many glaring abuses and improper practices. They have shown that generally utility properties are greatly overvalued in Washington. The findings in and status of each of these cases is discussed in the accompanying report.

"The task undertaken was large. It required the selection and building up of an experienced and qualified personnel. This personnel is now engaged upon the larger cases aforesaid still pending. These cases are those of the Pacific Telephone & Telgraph Company and its subsidiary the Home Telephone Company of Spokane (with combined book value of prop-

erties of approximately $65,000,000), the Puget Sound Power & Light Company (with book value of electrical properties of approximately $120,000,000), the Washington Water Power Company (with book value of properties of approximately $65,000,000). and the Pacific Power & Light Company (with book value of properties in Washington of approximately $17,000,000). No valuation has ever heretofore been made of the properties of the Puget Sound Power & Light Company. The properties of the Washington Water Power Company were valued in 1917 but this valuation was never kept to date. This company has since 1917 acquired a large amount of additional property, both by purchase and by construction and the 1917 valuation is now wholly useless. Upon request of the Department each of the five companies has prepared and furnished, or is preparing and will furnish, detailed inventories of its property, as well as other information and data with reference to the construction, maintenance, operation and financial history thereof.

"It is expected that the Pacific Power & Light Compay investigation will be completed and hearing thereon commenced about February, 1935, that the Puget Sound Power & Light Company investigation will be completed and hearing thereon commenced about June, 1935, and that the investigation of the Washington Water Power Company will be completed and hearing thereon commenced during the fall of 1935. Preliminary investigations of the Pacific Telephone & Telegraph Company and the Home Telephone Company of Spokane have already been made and preliminary hearings thereon held, at which evidence has been submitted by both the Department's Engineering and Accounting section and by the company. Before these cases can be completed it is necessary that the Department make considerable further investigations and studies which present appropriations do not permit. It is expected that,

appropriations permitting, concluding investigations will be made and hearings held during the ensuing year."

The receipts of the Department from all sources for the period 1929 to 1933, inclusive, were thus shown to be in excess of the expenditures of the Department in the performance of its manifold duties and activities during said period by the amount of $224,193.95. But no separate accounts were kept or required to be kept with the various public utility companies concerned, and as the trial court found, it was impossible to determine what was the expense of regulating and supervising railroads separately from the expense of regulating and supervising other public utility corporations, and it was equally impossible to determine what expense the Department incurred in discharging its functions and duties relating to railroads but not of a supervisory character. The court also found upon the record that the activities of the Department connected with the regulation and supervision of railroads were at all times relatively unimportant and inexpensive in comparison to the time devoted to and the cost incurred by the Department in regulating and supervising auto transportation companies and motor vehicle operations and telephone, electrical, gas, water and public utility corporations other than railroads, and in its non-

regulatory activities relating to railroads (Findings XI and XII; Tr. 48, 49).

It is entirely clear that the Legislature, following the Governor's recommendation, pursued the plan of taxing the railroads and other public utilities all together, for the purpose of paying *all* of the Department's expenses, no matter how incurred and no matter for what purpose. It is equally clear that a large surplus resulted from this plan for the years involved in this case, and that this surplus was devoted not to the regulation or supervision of railroads, but to the "special investigation and valuation" of power companies and telephone companies.

The legal question presented is simply whether under such a scheme and upon such a record the taxpayer is to be defeated because the fees paid by his class have been commingled with other funds without the provision of any official record or method of accounting to show the disposition of his payments.

The State Supreme Court answered this question by holding that the burden of proof was upon the appellant to make a segregation and show the excessiveness of the tax imposed upon the railroads and that "not having met the burden imposed upon it the respondent (appellant here) did not make a case for relief."

This holding was directly contrary to the rule announced by this court, that the burden of proof in such cases is upon those seeking to collect the combined charge. *Foote & Co. v. Stanley*, 232 U. S. 494, *supra.*

The Washington court then "going even beyond" its misplacement of the burden of proof, adverted to certain testimony of the auditor of the Department of Public Works and held that even if the State had the burden of proving that the fees collected from the railroads did not exceed the cost of their proper supervision and regulation, "the evidence preponderated against the findings made by the trial court as to the cost of supervising and regulating railroads."

This evidence was offered after both parties had rested and the case had been formally closed (Tr. 71), It was objected to as hearsay (Tr. 74), but was admitted by the trial court because he "didn't want the case to come back here." (Tr. 82.) It was in substance to the effect that at the auditor's request and not as a matter of duty, each employe of the Department "each month" handed him a slip "prorating his salary for the month to each class" of utility, and that this apportionment showed that the cost of "the railroad part of the Department of Public Works" exceeded the amount of the fees paid

by the railroads under the act of 1929. On cross-examination the auditor testified:

"Q. When did you make these figures?

A. I started making the figures around 1924; however, these are later figures. These figures I have compiled, the latter part of them, within the last month I should judge.

Q. These accounts were not kept currently from year to year?

A. Yes, I had them in the files in case I needed them.

Q. Why did you make them?

A. Originally, I made them before the one-tenth of one per cent law went in, to see about how the expenses were running between the various classes of utilities.

Q. Who furnished you the figures from which you made these compilations?

A. As to salaries, they were furnished by each individual. Each month, an individual turns in a slip to me prorating his salary for the month to each class.

Q. Something he did himself?

A. Yes.

Q. For himself?

A. Yes.

Q. Do you know whether he correctly prorated them or not?

A. No.

Q. It was no part of his official duties to make a prorata?

A. No, it was a request by me, and I checked to see they were turned in each month.

Q. Those figures were not required by any law to be kept?

A. No, not even by the department.

Q. Just some private memoranda you kept for your information?

A. For the information of the Department if it should ever be needed.

Q. What use would the Department have for them?

A. For just such a case as this, is likely to come up at any time.

Q. It was not of use on this class?

A. We had to keep it on motor vehicles and boats, and kept it for this, too.

Q. Because we had a statute on motor vehicles and boats that provided the tax be regulated by costs?

A. Yes.

Q. There was no such statute for railroads or utility companies?

A. No.

Q. They are not official in the sense of any rule, or order or rule of the Department that required them to be kept?

A. No.

Q. They are based on the proration of time handed in to you by the various employes of the Department?

A. Yes.

MR. DAPONTE: I move to strike the witness's testimony. It is based on hearsay. It was no part of his duty to keep these figures, and no part of the duty of the men from whom he obtained the figures

to keep them. It is his own private memoranda, kept out of curiosity, apparently, by Mr. Stookey, not official figures at all." (Tr. 73-74.)

On recross-examination the witness testified:

"Q. You have no knowledge of your own whether the figures turned in by the employees are correct or not?

A. No." (Tr. 76.)

As already stated, the trial judge viewed the evidence as immaterial, but permitted its introduction for purposes of the record. The State Supreme Court held that "while the account kept by the auditor was not official, in the sense that, of itself, it was admissible in evidence, yet what the auditor did in that respect qualified him to testify as to the ultimate fact." (Tr. 106.)

Thus, both state courts held the evidence inadmissible. Yet the Supreme Court indulged itself in the paradox of basing its decision upon this incompetent evidence. It satisfied itself by the device of saying that while the account kept by the auditor was inadmissible, yet what the auditor did in that respect qualified him to testify as to the ultimate fact. But the auditor had admitted clearly and unequivocally that he had no knowledge of his own whether the figures turned in by the employes were correct or not; that his evidence was based entirely on the proration of time handed him by the various employes

of the Department and that it was no part of their duty or his duty to make or keep any such record. Manifestly, therefore, if the record did not qualify as evidence in itself, it could not qualify the auditor "to testify as to the ultimate fact." He had no knowledge other than that arising from the record, and when the record to support his statement was withdrawn his testimony lost its entire foundation. It could not be made the means—as it was by the State Supreme Court—of denying the rights asserted by the appellant under the Federal Constitution.

That the records or memoranda on which the auditor based his testimony were inadmissible, and that his conclusion based exclusively thereon was equally inadmissible, there can be no doubt. The memoranda were not official, but personal; they were not made as a matter of duty to the Department, but merely to satisfy the auditor's personal request, and they were not made contemporaneously with the events supposed to have been recorded,—the time slips were turned in by the month and not by the day. *Wigmore on Evidence,* Sections 1632(1), 1523, 1526; *Bates v. Preble*, 151 U. S. 149; *Vicksburg, etc., R. Co. v. O'Brien*, 119 U. S. 99; *Nicholls v. Webb*, 8 Wheat. 326.

The holding of the State Supreme Court, therefore, that the evidence of the auditor preponderated

against the finding made by the trial court as to the cost of supervising and regulating railroads is completely without support. It has no basis in fact and this court will look through it to the record for the purpose of determining whether the Federal rights asserted by the appellant have been wrongly denied. *Truax v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254. In this case the court said:

"In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

Even had the auditor's testimony been admissible it would still, by his own admission, have failed to distinguish between regulatory and nonregulatory activities of the Department with respect to railroads. That much time of its staff was spent by the Department in such nonregulatory work appears from the Department's Annual Reports in evidence. Therefore the State would still have failed to comply with the rule laid down by this court in *Foote & Co. v. Stanley*, 232 U. S. 494, *supra*, that "it must be made

to appear that such tax does not materially exceed the cost of inspection—the burden in such cases being on those seeking to collect the combined charge."

Respectfully submitted for reversal,

F. G. DORETY,
L. B. DAPONTE,
THOMAS BALMER,
EDWIN C. MATTHIAS,
Counsel for Appellant.

APPENDIX A

For convenient reference there follows a digest of the provisions of the Public Service Commission Law relating to public utilities and railroads subject to the Department's jurisdiction. The fee imposed by Chapter 107, Laws of 1929, is to pay the expenses incurred by the Department in administering these provisions:

Remington's Revised Statutes, Sec. 10344:

Defines the meaning of words and lists the corporations subject to the Department's jurisdiction. They include street railroads, railroads, express companies, common carriers, (which comprise railroads, street railroads, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies); gas plants and gas companies, electric plants and electrical companies; telephone companies, telegraph companies, water companies, docks, wharves; warehouses, wharfingers and warehousemen.

"The term 'public service company', when used in this act, includes every common carrier, gas company, electrical company, water company, telephone company, telegraph company, wharfinger and warehouseman as such terms are defined in this section."

"Common carrier" is defined as follows:

"The term 'common carrier', when used in this act, includes all railroads, railroad companies, street rail-

roads, street railroad companies, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies, and every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, owning, operating, managing or controlling any such agency for public use in the conveyance of persons or property for hire within this state."

Sec. 10345: All charges of any common carrier shall be just, fair, reasonable and sufficient; every common carrier shall provide adequate facilities.

Sec. 10346: Every common carrier shall expeditiously receive and transport persons and property.

Sec. 10347: Every railroad company shall furnish sufficient cars and shall make equal distribution of cars.

Sec. 10349: Railroad companies shall construct switch connections and provide side tracks for shippers' use.

Sec. 10350: Provides for publication and adherence to tariffs.

Sec. 10353: Provides for filing interstate tariffs with the Department.

Sec. 10354: Prohibits free or reduced transportation.

Sec. 10356: Prohibits discrimination by "any common carrier" in the matter of rates and service.

Sec. 10357: Prohibits unreasonable preference by "any common carrier" to any person or corporation or to any locality or description of traffic.

Sec. 10358: The long and short haul section.

Sec. 10359: Prohibits false billing or underweighing, etc., by a common carrier or shipper.

Sec. 10361: Fixes fares on street railroads.

Secs. 10361-1-2: Relate to certificates of public convenience and necessity for steamboats and provide for annual statements of gross revenues and payment of one-fifth of one per cent and that the Department shall take into consideration all moneys on hand, to the end that the moneys collected shall be neither more nor less than sufficient to cover the cost of regulating or supervising such steamboat companies.

Sec. 10362: Relates to the duties of gas, electrical and water companies and provides that all charges shall be reasonable; that such companies shall furnish safe and adequate service and facilities and prescribe reasonable rules, etc.

Sec. 10363: Provides that gas, electrical and water companies shall file tariffs.

Sec. 10364: Provides that no change shall be made in any form of contract or in any rule relating to any rate, nor in any facility except after 30 days' notice.

Sec. 10365: Requires the published rates to be charged and certain exceptions.

Sec. 10366: Prohibits unreasonable preference by any gas, electrical or water company.

Sec. 10367 et seq. Relate to unjust discrimination.

Sec. 10371 et seq. Relate to telephone and telegraph companies, providing for just and reasonable rates, filing of tariffs, changes in tariffs; that published rates be charged; prohibiting unjust discrimination and undue preference, similarly as provided for common carriers and gas companies.

Sec. 10382 et seq. Relate to duties of wharfingers and make similar provisions as applied to telephone companies.

Sec. 10389: Provides for hearings and order of the Commission with respect to matters relating to common carriers.

Sec. 10390: Makes the same provision for gas, electrical and water companies.

Sec. 10391: For telephone and telegraph companies.

Sec. 10392: For wharfingers and warehousemen.

Sec. 10394: Provides that the Commission may investigate interstate rates and rules for the transportation of persons or property or the transmission of messages or conversations, so far as the state is affected thereby, and when excessive or discriminatory; or in violation of the act of congress, or in conflict with the orders or regulations of the Interstate Commerce Commission, the Department is empowered to apply to the Interstate Commerce Commission for relief. It is under this section that the Department is accustomed to take part in litigation before the Interstate Commerce Commission referred to in its annual reports.

Sec. 10395 et seq. Empower the Department to provide for rules for expediting traffic; and succeeding sections provide for weighing of freight and for track connections; and for investigation of wrecks.

Sec. 10400: Gives the commission power, after a hearing, to order facilities or repairs or changes in the equipment of any common carrier.

Sec. 10406: Empowers the Department to order improvements in gas plants and gas, electrical and water systems.

Sec. 10407: Makes similar provisions for telephone and telegraph companies.

Sec. 10408: For docks, wharves and warehouses.

Sec. 10409: Provides for physical connection and joint rates between telephone and telegraph companies.

Sec. 10410: Empowers the Department to appoint inspectors of gas and water meters.

Sec. 10416: Requires every public service company to file an annual report.

Sec. 10417: Is Sec. 107, Laws of 1929, requiring payment of a fee of 1/10 of 1% and is the act which is attacked in this case.

Sec. 10418: Provides for paying the fees into the revolving fund.

Sec. 10422: Relates to complaints against "any public service company."

Sec. 10423: Provides for hearings, orders and record on the complaint.

Sec. 10424: Provides for suspension of tariffs naming increased rates and for a hearing thereon.

Secs. 10428, 10429 and 10430: Provide for review of the Department's orders, supersedeas and appeal.

Secs. 10433 and 10434: Relate to overcharges and orders for refunds. This section is a prolific source of expensive litigation, as may be seen from the Department's reports.

Sec. 10441: Provides for valuing property "of every public service company". The section is amended by Chapter 165, Laws of 1933, so as to confer more extensive power. Under this section the Department has been for the last two years engaged in valuing the property of public utility companies other than railroads in connection with inquiries which it is conducting into the rates and practices of all of the power and light companies and the telephone companies. (See page 47 of its 1933 report.) Under this section there is practically no limit to the amount which the Department may spend.

Sec. 10442: Provides for summary proceedings to enforce the public service commission law or any order of the Department.

The public service commission law was greatly extended by various statutes enacted by the 1933 session.

Chapter 151, Laws of 1933, extends the Department's jurisdiction to cover supervision, regulation and control of issuance of securities by public service companies, other than railroads.

Chapter 152, Laws of 1933, provides for supervision and regulation of the contracts and practices between public service companies and their affiliated

interests. It is believed that this chapter does not include railroads.

Chapter 154, Laws of 1933, provides for regulation and supervision of storage warehouses and warehousemen.

Chapter 165, Laws of 1933, is a sweeping act giving the Department additional power of regulation of public service companies other than railroads, including budget control. This chapter imposes varied and expensive duties. The cost, of course, is defrayed from the revolving fund. The Department is given the right to assess costs in valuation and rate proceedings to the public service company involved.

Chapter 166, Laws of 1933, extends the jurisdiction of the Department to cover what it estimates to be 20,000 additional motor trucks engaged in hauling property for compensation, or in connection with private or commercial business. This chapter classifies the carriers into certified carriers, contract haulers, for hire carriers and private carriers. Under this chapter the Department has been engaged in hearing thousands of applications for licenses of motor carriers almost constantly during the past two years. (See page 13—1933 report.)

Highway and Railroad Crossings: Under Chapter 30, Laws of 1913, as amended, the Department has the duty of providing protection at railway and highway crossings and to separate grades when practicable.

APPENDIX B.

Following are the statutes of 1929, 1931 and 1933, appropriating money for the Department of Public Works:

"FROM THE GENERAL FUND.

* * * *

For the Department of Public Works:

Operations $124,200.00

FROM THE PUBLIC SERVICE REVOLVING FUND.

Operations $186,750.00

(Not to exceed fees collected)."

(Session Laws 1929, Chapter 228, page 640).

"FROM THE PUBLIC SERVICE REVOLVING FUND.

For the Department of Public Works:

Salaries and wages...$207,000.00

Operations 65,000.00

(Expenditures from

above not to exceed fees heretofore or hereafter collected).

Total for Department of Public Works:..... $272,000.00"

(Session Laws 1931, Chapter 144, page 466).

"FROM THE PUBLIC SERVICE REVOLVING FUND.

For the Department of Public Works:

Salaries and wages...	$145,000.00
Operations	35,850.00
Special investigation and valuation	250,000.00
(Expenditures not to exceed fees heretofore or hereafter collected)	
Total for Department of Public Works.....	$430,850.00"

(Session Laws 1933, Chapter 192, page 902).

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 20

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

Appeal from the Supreme Court of the State of Washington

(184 Wash. 648, 52 Pac. (2d) 1274.)

Appellant's Reply Brief

F. G. DORETY,
1120 Great Northern Bldg.,
St. Paul, Minnesota;

L. B. DAPONTE,
909 Smith Tower,
Seattle, Washington;

THOMAS BALMER,

EDWIN C. MATTHIAS,
404 Union Street,
Seattle, Washington;
Counsel for Appellant.

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Appellant's Reply Brief

This reply will serve to clarify and restate the questions for decision.

FIRST. Confusion may have been caused by appellee's reference to Chapter 227, Laws of 1929, quoted at page 8, and the argument based thereon at page 12 of appellee's brief. Chapter 227, Laws of 1929, is not in question and has no bearing. This is so because appellant withdrew in the Superior

Court its attack on Chapter 107, Laws of 1923, imposing a graduated regulatory fee not to exceed $1500.00. There was left in question only the constitutionality of the greatly increased regulatory fee imposed by Chapter 107, Laws of 1929. (See appellant's brief, p. 4.) Chapter 227, Laws of 1929, quoted by appellee, imposed a graduated fee on *all corporations*. Section 8, apparently overlooked by appellee, provides: "That the annual license fee required to be paid to the Department of Public Works by any *public service company* shall be deducted from the annual license fee provided herein and the excess only shall be collected."

Upon withdrawal of attack on Chapter 107, Laws of 1923, the moderate filing or regulatory fee not exceeding $1500.00, imposed thereby, which had previously been paid, was no longer in issue. Thus, credit was given the state for the fee paid under Chapter 107, Laws of 1923. The amount being equal to the license fee due under Chapter 227, Laws of 1929, no payment was due the Secretary of State by the express provisions of said Section 8 above quoted, and, of course, none was made to that officer. The judgment entered in favor of appellant by the Superior Court was for the amount paid under Chapter 107, Laws of 1929, less the filing or regula-

tory fee payable under said Chapter 107, Laws of 1923.

The account, showing amount paid under Chapter 107, Laws of 1923, and the amount paid under Chapter 107, Laws of 1929, with interest, is set forth in the findings, (Rec. 42 to 43). The explanation is made on page 4 of appellant's brief but seems to have escaped appellee's attention.

We wish to emphasize that we are making no attack on the license fee imposed by Chapter 227, Laws of 1929; that the license fee imposed thereby is not in question; that the judgment rendered in the Superior Court in favor of appellant for $25,-466.47 was for recovery of the regulatory fee and interest paid under Chapter 107, Laws of 1929, less the regulatory fee payable under Chapter 107, Laws of 1923. Consequently, the validity of Chapter 107, Laws of 1929, is the only question presented by this appeal. This explanation should clear up confusion that may have been caused by appellee's reference to Chapter 227, Laws of 1929, and the argument based thereon at page 12 of its brief.

SECOND. Of course we have no quarrel with appellee's argument that statutes are presumed to be valid. True it is that a fee imposed to pay cost

of regulating a utility or inspecting an article will be presumed to be reasonable. If Chapter 107 imposed a fee to pay the cost of supervising and regulating *railroads* the presumption would apply. Such a law would appear to be valid on its face. But Chapter 107 is not such a law. It imposes a fee, not to pay cost of regulating *railroads,* but a flat fee is imposed on railroads *and many unrelated public corporations to pay expense of regulating all of them.* The fee payable by railroads is not limited to the cost of regulating railroads nor is its disbursement restricted to paying that cost. The fees paid by all utility corporations, including railroads, go into a general state fund called the "public service revolving fund" out of which appropriations are made by the legislature to pay *all the expense* of the Department of Public Works. Thus, *even if the Department incurred not one dollar of expense in regulating railroads the fee or tax of 1/10 of 1% would nevertheless be payable each year in full.* It could and would be expended by the Department in regulating telephone, water, electric companies, etc., or for any other of its numerous activities. No more is needed to prove invalidity of the act. Certainly, Chapter 107 is not like the act held valid in *Charlotte, C. & A. R. Co. vs. Gibbes,* 142 U. S. 386, and cases cited in the opinion below.

And with equal assurance we say that Chapter 107 is not like any law imposing regulatory or inspection fees yet sustained by this court. So it is plain that we have here no room for presumption of validity—that is, presumption that the fee imposed to pay cost of *regulating railroads* is not excessive. This is true *because the fee is not imposed for any such purpose.* It is a flat fee imposed on railroads and many unrelated public service corporations to pay cost of regulating *all of them.* Such a law is void on its face because the fee is not imposed for the only purpose for which it can validly be imposed. *Foote vs. Stanley,* 232 U. S. 494, announces the rule applicable to laws like Chapter 107. The Railroad Retirement Case, 295 U. S. 330, is also apposite, for there the defect appeared from the face of the law.

The opinion below is clearly subject to this criticism. In applying the rule that statutes are presumed to be valid, it overlooked the distinction between a statute imposing a regulatory or inspection fee or tax restricted to a lawful purpose, and a general law like Chapter 107. Had the state court held valid a fee to pay cost of regulating railroads and other unrelated utility corporations, irrespective of the reasonable expense of regulating the several

kinds of business done by each, its decision would have been consistent, at least. But when it held that such a fee is presumptively reasonable to pay cost of regulating *railroads*, it did violence to the very terms of the law, for the fee is not imposed to pay the expense of regulating *railroads*. It is payable irrespective of that expense. Under Chapter 107 the expense of regulating railroads, as such, is not made the criterion of reasonableness. The criterion is, (and the act is so administered, Stookey's testimony Rec. 76) the expense of regulating railroads *and* a variety of other unrelated utility companies. Such a law has never been sustained by this court, and we confidently submit that it violates the due process clause of the 14th Amendment.

The state court refers to Rem. Rev. St. Sec. 10361-2, applicable to steamboat companies. As an example of what a valid law should be we quote Sec. 10361-2 in part, as follows:

> "Every steamboat company holding a certificate under this act, shall between the first and fifteenth days of March of each year file with the Department of Public Works, a statement showing the gross operating revenue of such company for the preceding calendar year, or portion thereof, and shall pay to the said department a fee not to exceed one-fifth of one per cent of the amount of such gross operating revenue: Provided, the fee so paid shall in no

> case be less than ten dollars. The percentage of gross operating revenue to be paid as herein provided shall be subject to future adjustment by the department, which percentage, not exceeding one-fifth of one per cent, shall be fixed by the department by general order entered at the beginning of any year. In fixing such rate the department shall take into consideration all moneys on hand paid in by such steamboat companies, to the end that the moneys collected hereunder shall be neither more nor less than sufficient to cover the cost of supervising and regulating such steamboat companies. * * * "

Were Chapter 107, Laws 1929, like the above law it would be presumptively valid and would not afford railroads just cause for complaint.

THIRD. The above is not the only ground of objection to Chapter 107. No less serious is the objection that it imposes a fee to pay expense of all the activities of the department relating to railroads and others, whether of a supervisory or non-supervisory nature. Appellee's brief has little or nothing to say about this objection, nor is it noticed by the opinion below as an objection appearing from the face of the act. The just principle which sustains laws of this kind is that one engaged in a business which requires regulation in the public interest may reasonably be required to pay the cost thereof. Where such regulation is exercised through commissioners, as said in the *Gibbes* case, "their

services are for the benefit of the *railroad corporation* as well as of the public." But this principle does not apply to a tax to pay expenses for which railroads are not responsible. Neither appellee in its brief nor the court below have said that *all* of the manifold duties and activities of the department relating to railroads are of a regulatory or supervisory nature. That they are not is self-evident. Finding X, Rec. 46, has not been questioned either by appellee in this court or by the court below. The objection is sufficiently argued in the opening brief.

We might add that the so-called Oregon "cross state" railroad extension case referred to in Finding X went to this court, *sub nom. Interstate Commerce Commission vs. Oregon-Washington R. & N. Co.*, 288 U. S. 14. Certainly the department in participating in this case was not regulating railroads in the exercise of any power it has or could have under the Public Service Commission Law of Washington quoted in the appendix to appellant's opening brief. The cross state extension did not even touch this state. The department appeared in that case as any other litigant to assist the Interstate Commerce Commission to a correct decision. It is a matter of common knowledge that such litigation is very expensive. The cost, whatever it was, came out of

the fees in question. But such expenses are incurred in the general interest and must be paid as other governmental costs. They cannot be saddled exclusively upon utility corporations in the guise of a regulatory fee.

If the act be invalid on its face there is no occasion to consider its practical operation, and we understand that this was the view of the state supreme court.

FOURTH. We have shown in the opening brief that the accumulation of the amounts contributed by railroads and utility corporations over the period 1929 to 1933 amounted to $224,193.95 over the expenses. How much of this fund was the excess over the cost of regulating railroads and how much the excess over cost of regulating other utilities was not and could not be shown, for the department neither kept nor was required by law to keep any record of the details of its expenditures. The testimony of Mr. Stookey, the department's auditor, (offered, apparently, as an afterthought), that the department's expenses attributable to railroads exceeded by $37,833.14 the amount of railroads' contributions to the revolving fund has been discussed in the opening brief. To what is there said we should add that it was open to appellee to call the employees

of the department having first hand knowledge to testify to the activities which they charged to railroads. It does appear, however, that the department's employees numbered for 1929 an average of 43, for 1930 average of 40, 1931 average of 38, 1932 average of 42, 1933 average of 95 and first eleven months of 1934 average of 142. (Rec. 65.) Not one of them devoted all, or even the greater part of his time, to railroads. Even Lonergan, chief of transportation, was concerned with motor vehicles and other transportation companies, as well as railroads, and had charge also of the department's participation in proceedings before the Interstate Commerce Commission. (Rec. 80-81.) It is noted further that in 1933, when the department began to litigate with the power companies, etc., its employees were more than doubled and in 1934 more than tripled. The entire expense of all this litigation was paid out of the common fund. The auditor testified that the amount paid in by the railroads for 1929-1933, inclusive, was $101,549.00. (Rec. 72.) The disbursements charged to railroads on the time slips was $139,382.00, or $37,833.00 in excess of their contributions. Looking to the department's annual reports in evidence it is plain that no expense even remotely approximating this sum could possibly have been incurred by the department in discharging its *regu-*

latory duties relating to railroads. The reports show that it had but little to do with railroads during this period. On the contrary, it expended the entire balance of the fees on hand in 1933 of $224,193.95, and a great deal more, in litigating with telephone, power, gas and other utility companies. The facts were so found by the trial court and are not questioned either in the opinion below or appellee's brief here.

For convenient reference we reproduce Finding XI, Rec. 48, as follows:

> "The accumulation of the amounts paid by railroads and other public utility corporations and other receipts of the Department over the period 1929 to 1933, inclusive, are shown in the annual reports of the Department to the Governor in a financial statement appended thereto. At the end of 1933, as shown on page 79 of the report for 1933, there was a surplus in the Department's fund amounting to $224,193.95. The receipts of the Department from all sources were in excess of the expenditures of the Department in the performance of its manifold duties and activities during said period by said amount. But no separate accounts were kept or required to be kept, with the various public utility companies concerned, and it is impossible to determine what was the expense of regulating and supervising railroads separately from the expense of regulating and supervising other public utility corporations with which the funds contributed by railroads were commingled; and it is impossible to determine what was the ex-

pense incurred by the Department in discharging its functions and duties not relating to supervising and inspecting railroad companies and other public utilities all of which were required by law to be paid and were in fact paid out of said common fund. But the court finds that the activities of the Department connected with the regulation and supervision of railroads are and were at all times relatively unimportant and inexpensive in comparison with the time devoted to and the cost incurred by the Department in regulating and supervising auto transportation companies and motor vehicle operations, and its activities relating to and expenses incurred in the regulation and supervision of telephone, electrical, gas, water and public utility corporations other than railroads and in its nonregulatory activities relating to railroads. The activities of the Department relating to the discharge of its manifold functions and duties are stated in detail in its several annual reports to the Governor offered in evidence in this cause. Said balance of $224,193.95 and said additional sums appropriated by the legislature in 1933 were expended by the Department in 1934 in carrying on investigations of and litigation with public utility corporations other than railroads and with which railroads, including plaintiff, were in no way concerned, as more fully appears from the Department's report to the Governor for 1934. See especially pages 11 and 91 *et seq.* thereof."

FIFTH. We have not overlooked the statement on page 32 of appellee's brief that the auditor's testimony went in without objection from appellant. It is true that appellant did not object to this tes-

timony as it was given. It was not then subject to objection, for it did not appear at that time that it was based upon hearsay. That it was hearsay appeared on cross examination and motion to exclude it was promptly made by appellant. There is another answer to appellee's suggestion that objections were waived because not timely made, namely: that the state supreme court did not refuse to consider the objection but overruled it and held the auditor's testimony admissible. (Rec. 91.) As the state court did not refuse to consider appellant's objection because not timely made, appellee's point is not open in this court.

SIXTH. If more need be said, we emphasize that, even if it be admitted that the expenses attributed by the employees of the department to railroads on the time slips given the auditor were incurred in connection with railroads, our case is not met, because it appears affirmatively that many of the department's activities relating to railroads in which it incurred large expense were not of a supervisory or regulatory nature. This subject has been sufficiently discussed both in this and the opening brief. The state court does not question that this was so. In its discussion of this feature it merely assumed that all expenses relating to rail-

roads were of a regulatory kind for which the railroads could lawfully be required to pay. That the learned court was mistaken in this assumption is established by the uncontradicted evidence.

In conclusion, we feel justified in remarking that appellant has done all that it can fairly be expected to do in waiving its valid objections to the fee payable under Chapter 107, Laws 1923. The fees payable under that chapter are fully as much as can properly be charged to it on account of any and all regulatory and supervisory expense incurred or to be incurred by the department in regulating railroads. Even if it were incumbent upon appellant to prove that this is so the unquestioned findings of the trial court, based upon the department's reports in evidence, establish the fact beyond possibility of successful contradiction.

Respectfully submitted,

F. G. DORETY,
L. B. DAPONTE,
THOMAS BALMER,
EDWIN C. MATTHIAS,
Counsel for Appellant.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON
(184 Wash. 648, 52 Pac. (2d) 1274)

BRIEF OF APPELLEE

G. W. HAMILTON,
Attorney General,

GEO. G. HANNAN,
Assistant Attorney General,
Attorneys for Appellee.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

In correction of and in addition to appellant's statement of the case, we wish to cover certain points in a brief statement in behalf of the appellee.

Besides appellant, three other plaintiffs, railroad corporations in like circumstances, brought like actions against the State of Washington and the four cases were tried together in the superior court. (R. 55-58.)

The inspection fee clause of the United States Constitution, found in the third paragraph of Section 10, Article 1, was not pleaded by the appellants.

Appellant's statement in his brief, page 13, to the effect that appellee's testimony was admitted over objection is incorrect. It went in without objection. (R. 72.) It was only after cross-examination, when appellants learned that the testimony was not in their favor, that they moved to strike it. (R. 74.) Further examination of the witness went unchallenged. (R. 74-80.)

Prior to 1929 appellant was paying the state certain fees under two separate statutes. One of these statutes, Remington's Supplement of 1927, Section 3841, applied to all corporations doing business in the state, and imposed an annual tax or excise therefor. That statute was superseded by the Laws of 1929, Chapter 227 (Rem. Rev. Stat., Secs. 3836-1 to 3836-8) which later statute required that the regulatory fee of 1/10 of one per cent paid to the Department of Public Works should be deducted from the amount to be paid by the corporation. In the case at bar this fee exceeded the fee required by Chapter 227, Laws of 1929, to be paid to the Secretary of State by all corporations.

Upon the trial of the cases, notwithstanding the trial court's announcement that only a matter of law was involved in the cause (R. 60, 62, 63, 82), he made all findings asked by plaintiffs in each case. These findings included a brief and argument for plaintiff and were set aside by the supreme court of the state in reversing the trial court's judgment. (184 Wash. 648, 52 Pac. (2d)

1274.) (R. 91.) Exceptions to findings are not required in Washington under Court Rule XVI found in 157 Wash., page XXXIII. That rule reads as follows:

"RULE XVI.

"EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

"1. It shall not be necessary or proper, in order to obtain appellate review thereof, to take or enter an exception to findings of fact or conclusions of law of a court or judge upon a case or part of a case, either legal or equitable, tried without a jury; nor shall it be necessary to take exception to the refusal of the court to make proposed findings or proposed conclusions of law.

"2. This rule shall apply and be applicable to cases now pending as well as to those which may be hereafter instituted."

Appellant during the years 1929 to 1933, inclusive, was engaged in intrastate transportation on its railroad in the State of Washington. It was also engaged in interstate transportation over the same lines in connection with its road outside of the state. The situation in each of the years involved was the same, excepting as to amount of revenue, tax and a few minor matters. Taking the year 1933 as an example, appellant had within the state 1,929.19 miles of railway, and its total lines within and without the state amounted to 11,936.04 miles. (R. 122.) Appellant's lines in the State of Washington were worth $66,100,000 and its operating revenue within the state, including both intrastate and interstate transactions, was $8,114,350.47, of which $3,137,046.00 arose out of intrastate transactions. (R. 122.) Consequently the one-tenth of one per centum fee imposed thereon by Section 1 of Chapter 107, Laws of 1929, Rem. Rev. Stat 10417 was $3,137.04. The statute is set out on

pages 2 and 3 of appellant's brief, but for convenience we also copy it herewith and it will be found as follows:

"Section 1. That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under chapter 248 of the Laws of 1927, shall, on or before the first day of April of each year, file with the department of public works a statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue; *Provided,* That the fee so paid shall in no case be less than ten dollars."

No fee was paid or asked because of the interstate transactions of the appellant under this statute.

Under Chapter 227, Laws of 1929, which applies to all corporations, be they public service or otherwise in their activities, the amount of the tax or excise allocated to and charged against the appellant by the Secretary of State for the year of 1933 was the sum of $985.60. (R. 41.) For convenience we set out the material portions of that Chapter as they appear in Remington's Revised Statutes, Sections 3836-4, 3836-5 and 3836-6.

"Section 3836-4. DOMESTIC CORPORATIONS—ANNUAL LICENSE FEE—SCHEDULE. Every corporation organized under the laws of this different fee schedule, shall pay, on or before the first day of July of each and every year, to the secretary of state, for the use of the state, an annual license fee of fifteen ($15.00) dollars for the first fifty thousand ($50,000.00) dollars or less of its authorized capital stock; and one-fortieth (1/40) of one per cent (1%) additional on all amounts in excess of fifty thousand ($50,000.00) dollars, and not exceeding one million ($1,000,000.00) dollars; and one one-hundredth (1/100) of one per cent (1%) additional on all amounts in excess of one million ($1,000,000.00) dollars, and not

exceeding four million ($4,000,000.00) dollars; and one two-hundredth (1/200) of one per cent (1%) additional on all amounts in excess of four million ($4,000,000.00) dollars; but in no case shall an annual license fee exceed the sum of twelve hundred fifty ($1,250.00) dollars; * * *.

"Section 3836-5. FOREIGN CORPORATIONS—ANNUAL LICENSE FEE. All foreign corporations doing intrastate business, or hereafter seeking to do intrastate business in this state shall pay for the privilege of doing such intrastate business in this state the same fees as are prescribed for domestic corporations for annual license fees in the preceding section, such fees to be computed upon the proportion of the capital stock represented or to be represented by its property and business in this state to be ascertained by comparing the entire volume of business with the volume of intrastate business in this state * * *.

"Section 3836-6. FOREIGN CORPORATIONS—APPEAL TO COURTS. That in the event any such foreign corporation shall feel aggrieved at the decision of the secretary of state relative to the fee for the filing of its articles of incorporation, or by the action of the secretary of state in fixing its annual license fee, it may, within thirty days file its notice of appeal from such order in the superior court of Thurston county, Washington, together with a statement of the grounds of its appeal and the reductions or changes in such fees sought, and the court shall proceed summarily to hear and determine the questions raised by such appeal and make and enter such order therein as to the court may seem meet and proper; And provided further, That either party may have the right of appeal from such judgment and decision to the supreme court of the State of Washington, the practice and procedure in appeals in civil cases to govern such appeals."

SUMMARY OF ARGUMENT

I

The statute, Laws of 1929, Chapter 107, Rem. Rev. Stat. 10417, as construed by the state supreme court is valid on its face, because:

(a) Every presumption is in favor of the statute's validity.

(b) Its purpose is solely to regulate public service corporations.

(c) This court is bound by the construction placed upon state statutes by the highest court of the state.

(d) A state may tax and regulate intrastate, and incidentally, interstate commerce without violating the commerce clause of the United States constitution.

(e) A state is not required to fix regulatory fees with exactness.

(f) Imposing no unequal burden on appellant, the statute does not violate the equal protection and immunity clauses of the fourteenth amendment.

(g) As its terms contain no indication of confiscation or excessiveness, it does not violate the due process clause of the fourteenth amendment.

II

The statute as construed by the state supreme court and administered by the state officers is valid because:

(a) All presumptions are in favor of the validity and regularity of public laws and the actions of public officials.

(b) The burden of proof is upon appellant and the evidence does not show a discrimination between appellant and others in similar circumstances.

(c) The evidence does not show an unreasonable or excessive fee imposed upon appellant nor upon the class to which appellant belongs, railroad companies.

(d) The evidence does not show that railroads are charged more than the reasonable expense of their regulation.

(e) The evidence actually does show that reasonable regulation of railroads in the State of Washington for the years involved cost the state $37,833.14 more than the fees imposed upon them for that purpose.

ARGUMENT

Chapter 107, Laws of 1929, Rem. Rev. Stat. of Washington, Sec. 10417, Is Valid and Violates Neither the Commerce Clause Nor the Due Process Clause of the United States Constitution.

We now wish to give attention to appellant's assignments 1, 2 and 3 (R. 106 and 107), which raise the point that the statute is void upon its face. On this point we think appellant's argument is manifestly unsound, as the statute contains nothing on its face to indicate invalidity. In considering this statute and the fee imposed thereunder, it is necessary to also consider the license tax or excise deducted from that fee by the Secretary of State.

The allocation by the Secretary of State of $985.60 against appellant as a license or privilege tax for the year of 1933 under Laws of 1929, Chapter 227, Sections 4 and 5, Rem. Rev. Stat., 3836-4 and 3836-5, was not raised in the state courts and is not questioned here. Nor could it be questioned, as appellant took no appeal from such allocation by the Secretary of State as required by Section 6 of the act, Rem. Rev. Stat., 3836-6. *Van Dyke v. School District No. 77,* 43 Wash. 235, 86 Pac. 402; *State ex rel. Board of Directors District No. 306 v. Preston,* 120 Wash. 569, 208 Pac. 47; *Utley v. St. Petersburg,* 292 U. S. 106, 78 L. Ed. 1155.

Sections 3836-4 and 3836-5 and 3836-6 of Rem. Rev. Stat., *supra,* impose a privilege or license tax upon all corporations for doing intrastate business in the State of Washington. *Pacific Tel. & Tel. Co. v. Seattle,* 172 Wash. 649, 21 Pac. (2d) 721. These sections will be read and

considered with Laws of 1929, Chapter 107, Rem. Rev. Stat., 10417, imposing the 1/10 of 1% regulatory fee.

Statutes imposing such a tax or excise are well within the police and taxing powers of the state, constitute no direct burden on interstate commerce and do not violate the United States constitution. *Atlantic Lumber Co. v. Commissioners of Corporations & Taxation*, — U. S. —, 80 L. Ed. Adv. Ops. 908, decided May 25, 1936. These sections must be read and considered with Laws of 1927, Chapter 107, Rem. Rev. Stat., 10417, *supra*, imposing the disputed regulatory fee.

When this privilege tax or license fee of $985.60 for the year of 1933 is deducted from the 1/10 of 1% regulatory fee of $3,137.04 it leaves a balance of only $2,151.44. This sum amounts to a little over 1/15th of the 1% of the gross operating revenue for regulation of a public service corporation operating within the state 1,929.19 miles of railway valued at $66,100,000.00 returning an intrastate operating revenue of $3,137,046.00 and an interstate operating revenue of $4,977,304.00 collected within the state. In view of the foregoing facts and statutes it certainly requires an enormous stretch of a grieved imagination to conclude that the law is void upon its face because of an excessive fee.

All funds exacted by the state from public service corporations under Laws of 1929, Chapter 107, Rem. Rev. Stat., 10417, go into the public service revolving fund. That fund is used solely for regulatory purposes. *Pacific Tel. & Tel. Co. v. Seattle*, 172 Wash. 649, 21 Pac. (2d) 721, which case was affirmed by this court in 291 U. S. 300, 78 L. Ed. 810. The state has the undoubted right to

charge against utilities all reasonable costs of their regulation and the burden is on appellant to point out any excessiveness in the fees imposed. *Charlotte C. & A. R. Co. v. Gibbes,* 142 U. S. 386, 35 L. Ed. 1051. In *New York v. Squire,* 145 U. S. 175, a state statute was also upheld. *Atlantic Pacific Tel. Co. v. Philadelphia,* 190 U. S. 160, is of like effect with the preceding cases. In the course of the opinion the court said:

"* * * When it is authorized only in support of police supervision, the expense of such supervision determines the amount of the charge; and, if it were possible to prove in advance the exact cost, that would be the limit of the tax. In the nature of things, that, however, is ordinarily impossible, and so the municipality is at liberty to make the charge large enough to cover any reasonable anticipated expenses. It is authorized to fix such charge in advance, and need not wait until the end of the period for which the license is granted. It may not act arbitrarily or unreasonably, but the risk may rightfully be cast upon the licensee, and the charge cannot be avoided because it subsequently appears that it was somewhat in excess of the actual expense of the supervision, nor can the licensee then recover the difference between the amount of the license and such cost.

* * * * * * * *

"We pass, therefore to consider the question of the reasonableness of this license charge. *Prima facie,* it was reasonable. *Western U. Teleg. Co. v. New Hope,* 187 U. S. 419, ante, 240, 23 Sup. Ct. Rep. 204. It devolved upon the company to show that it was not * * *."

All regularly enacted statutes are presumed to be valid. The supreme court of the State of Washington in deciding the case at bar so held, 184 Wash. 648, at 652. In so doing, it followed a long and unbroken line of its own decisions, only a small portion of which is cited in the opinion. The same rule has been repeatedly stated by the United States supreme court and applied when considering a state statute. *Powell v. Pennsylvania,* 32

L. Ed. 253, 127 U. S. 678, in which case the court quoted and cited other cases at pages 684 and 685 of the original report, as follows:

"* * * 'Every possible presumption,' Chief Justice Waite said, speaking for the court in *Sinking Fund Cases*, 99 U. S. 718 (25:501) 'is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.' See also *Fletcher v. Peck*, 10 U. S. 87, 6 Cranch 87, 128 (c:175); *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518, 625 (4:629,656); *Livingston County v. Darlington*, 101 U. S. 407 (25:1015); *Detroit International Bridge Co. v. Corporation Tax Appeal Board*, 287 U. S. 295, 77 L. Ed. 314."

The statute involved, Rem. Rev. Stat., 10417, *supra*, contains nothing to rebut the presumption of validity interpreting it solely by its own terms. It contains nothing to indicate that the fee imposed thereby is or is not collected from or used to regulate any utility but railways. Other statutes bring other utilities within the act if they are existent within the state and regulated thereby. However, such can be established only by evidence, and we are now merely looking the statute in the face.

Even assuming for the sake of argument that the expense of regulating utilities other than railroads was paid out of the public revolving fund, still there can be no presumption that the fund was excessive or that any class of utilities required for regulation more or less than the statute commanded them to contribute to the fund. Neither is it justifiable to presume that some particular class of utility is over-charged for the benefit of the others nor that if such was the case appellants would be

the ones to suffer. No such conclusions can be gathered by a reading of the statutory terms. Nor is there any apparent discriminatory burden on public service corporations as a class. Laws of 1929, Chapter 227, Rem. Rev. Stat., Secs. 3638-4, 3638-5, *supra,* imposing a license tax on all other corporations, while in effect exempting public service corporations makes such corporations a favored class. This favored class includes the railroads, and they have no apparent cause for complaint.

Another point to be considered is that the rates, charges and services of appellants are subject to being regulated and established as to intrastate commerce by the state department of public service. Any fees imposed therefor, like other taxes, constitute an expense of operation and presumptively have been or will be absorbed in fixing the rates and charges of the utilities and are therefore immaterial at the present time. *West Ohio Gas Co. v. Public Utilities Commission of Ohio,* 294 U. S. 63, 79 L. Ed. 761.

We now wish to call attention to the cases cited by appellants in their brief.

Postal Tel. & Cable Co. v. New Hope, 192 U. S. 55, is not in point, as that turned on the question of not whether the fee was reasonable, but whether the court could reduce it and grant a less amount upon submission of the case to the jury. The court recognized the right to charge the utility with its regulation, and also recognized that in controversies involving such an imposition of taxes, or fees, the burden is upon the affirmative pleader.

State ex rel. Davis-Smith v. Clausen, 65 Wash. 156, 117 Pac. 1101, and *Mountain Timber Company v. State*

of Washington, 243 U. S. 219, cited in brief of appellant, pages 39 and 40, are merely cases sustaining the Workmen's Compensation Law of the State of Washington.

Noble State Bank v. Haskell, 219 U. S. 104, brief of appellant, page 42, affirmed the supreme court of Oklahoma in sustaining the validity of the Oklahoma statute requiring a bank deposit guaranty fund.

Foote v. Stanley, 232 U. S. 494, 58 L. Ed. 698, brief of appellant, pages 29 and 34, upon which appellant places great reliance, is not parallel to the cases at bar in any particular, and does not support the appellant's position. That case was a suit, not to recover fees paid, but to enjoin the exaction of fees in the future. The act involved was the Maryland law, imposing an inspection fee of one per cent per bushel on all oysters, including those shipped in and out of the state. All the revenue involved in the suit was derived from this inspection fee. The salary of the inspectors was fixed by the act, and in the past, $40,000 per year was exacted in fees. Two-thirds of the sum so collected was used for purposes other than inspection of the oysters in both domestic and interstate commerce. The act itself showed that the fee was excessive and was used for other purposes than inspection. The case was brought under the inspection clause of the United States constitution, which was neither pleaded nor involved in the case at bar, except in its remote effect on interstate commerce. A careful reading of the opinion discloses that the burden is only upon the proponent of the tax when the objectional facts cited are shown upon the face of the act. The opinion also shows that the case really supports the position of the State of Washington in the cases before the court as the

public service revolving fund is used solely for regulatory purposes.

In the course of the opinion, the court used the following language:

"2. Inspection necessarily involves expense, and the power to fix the fee, to cover that expense, is left primarily to the legislature, which must exercise discretion in determining the amount to be charged, since it is impossible to tell exactly how much will be realized under the future operations of any law. Besides, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. If, therefore, the fees exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately upon application, because of the presumption that the legislature will reduce the fees to a proper sum.

* * * * * * * *

"In such inquiry they treat the fees fixed by the legislature for inspection proper as *prima facie* reasonable, and do not enter into any nice calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered."

The case of *Lugo v. Suazo,* 59 Fed. (2d) 389, cited on page 32 of appellant's brief, appears to be based solely upon the *Foote* case, *supra.* It involves the validity of an act of Puerto Rico. The constitutional status of a sovereign state cannot be compared with the status of a territory and for that reason the case can be of little, if any, value. Furthermore, the funds involved were all raised by the handling of foreign coffee and were used to protect the domestic coffee industry. That is not the situation in the case at bar, where any surplus in the

public service revolving fund came in not from the railroads but from other utilities, a point which appellant is not in a position to raise. *Utah Power & Light Co. v. Pfost,* 286 U. S. 165, 76 L. Ed. 1038.

The *Foote* case was also cited by the supreme court of the United States in *Pure Oil Co. v. Minnesota,* 248 U. S. 158, 63 L. Ed. 180, where the Minnesota inspection law was affirmed. The fees collected in six years were $62,689, while the expenses of the inspection were $46,863.00.

Baer Bros. Marcantile Co. v. D. & R. G. R. Co., 233 U. S. 479, 58 L. Ed. 1055, Brief of Appellant, page 36, involved a reparation order of the Interstate Commerce Commission, and held that rates and reparations may be covered by the same order. It did not involve a state statute, nor does it throw any light upon interpreting the statute. It is of no importance in the matter at bar.

Charlotte C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. Ed. 1051, *supra,* also cited in Brief of Appellant, pages 27 and 37, is nearer in point. There a South Carolina statute imposing fees upon the railroads for all expenses of the railroad commission, including salaries of the commissioners, was sustained. The South Carolina statute was based upon the gross income, according to the mile of track in the state. If this is a proper measure, it surely cannot be successfully contended that the fee measured by the gross income of the utility is not proper, as the latter is certainly the more closely connected with equitable principles and the proportionate expense of the regulation. During the opinion the court stated:

"* * * The mode or manner of regulation is a matter of legislative discretion. When exercised through

commissioners, their services are for the benefit of the railroad corporations as well as of the public. Both are served by the required spervision over the roads and means of transportation, and there would seem to be no sound reason why the compensation of the commissioners in such case should not be met by the corporations, the operation of whose roads and the exercise of whose franchises are supervised. In exacting this there is no encroachment upon the fourteenth amendment * * *."

Appellant also cites cases from the Washington supreme court decided prior to that decision by that court in the case at bar. Such cases can have no effect upon the situation. In deciding the present case the Washington court expressed the ultimate position of that tribunal on the matter at bar, and all portions thereof. We will pay no further attention to those decisions.

Appellant also cites cases from the supreme courts of other state. These cannot possibly be of any value. All in conflict therewith are repudiated by the position of the supreme court of Washington in the decision under consideration. (184 Wash. 648, 52 Pac. (2d) 1274, R. 91.)

The supreme court of the United States, after the construction of a state statute by the highest court in the state, is concerned only with the question of whether or not such statute so construed violates the United States constitution. *Gregg Dyeing Co. v. Query,* 286 U. S. 472, 76 L. Ed. 1232; *Southern Iowa Electric Co. v. Chariton,* 255 U. S. 539, 65 L. Ed. 764; *Georgia Railway Co. v. Decatur,* 262 U. S. 432, at p. 437, 67 L. Ed. 1065; *Denney v. Pacific Telephone & Telegraph Co.,* 276 U. S. 97, 72 L. Ed. 483, and *Puget Sound Traction Co. v. Reynolds,* 244 U. S. 574; *Detroit Int. Bridge Co. v. Corp. Tax Appeal Board,* 287 U. S. 295, 77 L. Ed. 314, *supra.*

By using his cited cases appellant seeks to demonstrate that the fee imposed by the statute for regulatory purposes is excessive. In this we think appellant misconstrues the cases. The proper rule to be deducted from those and other cases is that the burden is never upon the state to show that the statute is not excessive nor discriminatory unless the statute is on its face void, confiscatory or discriminatory, which is not the case with the statutes under consideration here.

Many of appellant's cases are cited in the *Mackey Telegraph and Cable Co. v. Little Rock,* 250 U. S. 94, 63 L. Ed. 863, which case involved the regulatory license fee imposed upon telegraph companies by a municipal corporation in the state of Arkansas. It is closer in point than the *Foote* case, upon which appellant so heavily leans, because the *Foote* case involved an inspection fee under the inspection clause of the constitution while in the matter at bar that clause is not initial. This court in the *Mackey* case sustained the fee imposed by the municipality.

ON ITS FACE THE STATUTE DOES NOT IMPOSE A DIRECT BURDEN UPON INTERSTATE COMMERCE, AND DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The supreme court of this state, having held the statute under consideration to be purely regulatory in *Pacific Tel. & Tel. Co. v. Seattle,* 172 Wash. 649, *supra,* which case was affirmed by this court in 291 U. S. 300, 78 L. Ed. 810, all courts are bound by that decision.

That the state has the right to regulate and tax domestic commerce is beyond all doubt. The only restriction is that such regulation, or taxation shall not directly

burden interstate commerce. An indirect or incidental burden or interference with interstate will not vitiate the state statute. If such interference were construed to violate the commerce clause of the United States Constitution no state could function, for under the complex industrial system of modern civilization nearly every law or ordinance of a state, or municipality has some effect upon interstate commerce. This distinction is recognized by the supreme court of the United States and of the several states in cases too numerous to tabulate. Some of these cases apply to taxation, while others apply to regulation. *Underwood Typewriter Co. v. Chambelain,* 254 U. S. 113, 65 L. Ed. 165; *Graniteville Mfg. Co. v. Query,* 283 U. S. 376, 75 L. Ed. 1126.

In *Lehigh Valley Ry. Co. v. Commonwealth of Pennsylvania,* 145 U. S. 192, 36 L. Ed. 672, an excise imposed upon railroad companies according to the amount of their domestic traffic, as in the Washington statute, was affirmed by the supreme court of the United States, even though interstate commerce was carried on by the same companies over the same lines at the same time.

In *New York ex rel. Cornell Steamboat Co. v. Sohmer,* 235 U. S. 549, 59 L. Ed. 355, a statute imposing an excise of five-tenths of one per cent upon domestic commerce carried on by a steamboat company engaged in both domestic and interstate commerce was sustained.

In *Denver & Rio Grande Railroad Co. v. Denver,* 250 U. S. 241, 63 L. Ed. 958, an ordinance requiring the removal of a railroad track used in both domestic and interstate commerce, was sustained even though the removal threw a burden upon interstate commerce, the court saying:

"The situation is unusual and the ordinance deals with it in a rather practical way. Giving effect to all that appears, we are unable to say that what is required is plainly unreasonable and arbitrary."

The case of *Clark v. Poor,* 274 U. S. 554, 71 L. Ed. 1199, while involving the use of the state highways and the regulation of motor busses, recognizes the right of each state to regulate domestic, and in many instances, interstate, commerce so long as such regulation is not a direct and material burden on interstate commerce. In the course of the opinion the court said:

"There is no suggestion that the tax discriminates against interstate commerce. Nor is it suggested that the tax is so large as to obstruct interstate commerce. It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the commission in the administration or enforcement of the act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

In *Boeing Air Transport Co. v. Edelman,* 51 Fed. (2d) 130, a four cent gasoline tax was held valid for the purpose of regulating airports, notwithstanding the fact that the airplanes used no highways built by the state and were employed in interstate transportation.

Prouty v. Coyne, 55 Fed. (2d) 289, where a state license tax on cars according to weight thereof used exclusively in interstate transportation was upheld for the purpose of regulation and also maintaining of roads.

In *Continental Baking Co. v. Woodring,* 55 Fed. (2d) 347, a mileage and capacity tax upon automobiles used in interstate commerce was held good for the purpose of road maintenance and regulation.

NEITHER THE PRIVILEGE AND IMMUNITIES CLAUSES, NOR THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS VIOLATED BY THE STATUTE AS INTERPRETED BY THE WASHINGTON SUPREME COURT.

Having shown, we think, that the plaintiffs have no complaint under the commerce clause of the United States constitution, we now wish to direct the court's attention to the fourteenth amendment. We first take up those clauses prohibiting a state from abridging privileges or denying equal protection of its laws to a citizen of the United States. These clauses are violated only by unequal burdens imposed by a state. They are not applicable to excessive burdens imposed impartially upon *all* alike. *New York ex rel. Bryant v. Zimmerman,* 278 U. S. 63, 73 L. Ed. 184; *American Sugar Refining Co. v. State of Louisiana,* 179 U. S. 89, 45 L. Ed. 102.

As long as all railroads are used alike, as they are, under the statute of the state, no one of them can successfully invoke these clauses of the constitution. Had some railroads been left out and the burden imposed upon the plaintiffs, thereby narrowing the class to less than a reasonable classification, the plaintiffs might complain. Broadening the class and putting other utilities in with the railroads is no cause for complaint from the railroads, who are properly within that class. The charges are presumed to be reasonable and necessary for the regulation of the railroads. The disposition of the funds, other than those used, or necessary for the regulation of the railroads, is wholly immaterial. *Clark v. Poor,* 274 U. S. 554, 71 L. Ed. 1199, *supra.*

The due process clause of the above amendment is the only United States constitutional provision pleaded

by plaintiffs which concerns excessive charges when imposed by a state against all members of a class. Where this clause of the fourteenth amendment is invoked, as it is here, the United States courts are concerned with neither discrimination nor classification. The inquiry is narrowed to determine only whether in fact and in effect property of the complaining party is taken or used without adequate compensation. In *State Corporation Commission v. Wichita Gas Co.*, 290 U. S. 561, 78 L. Ed. 500, the court said:

"* * *. And upon the issue of confiscation *vel non* they are entitled to the independent judgments of the courts as to both law and facts. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 289, 64 L. Ed. 908, 914, 40 S. Ct. 527, P. U. R. 1920E, 814; *Bluefield Water Works & Improv. Co. v. Public Ser. Com.*, 262 U. S. 679, 689, 67 L. Ed. 1176, 1181, 43 S. Ct. 675; *United R. & E. Co. v. West*, 280 U. S. 234, 251, 74 L. Ed. 390, 411, 50 S. Ct. 123."

In *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 72 L. Ed. 554, which, however, involved the use of the highways in interstate commerce, the court used the following language:

"That appellant is already contributing to highway maintenance is not in itself significant, for the state does not exceed its constitutional power by imposing more than one form of tax as a charge for the use of its highways in interstate commerce. It is for appellant to show that the aggregate charge bears no reasonable relation to the privilege granted."

Los Angeles G. & E. Corp. v. Railroad Com., 289 U. S. 287, 77 L. Ed. 1180, was a rate case where the due process of law was pleaded by the utility. The court, in commenting upon the application of that clause of the constitution, remarked as follows:

"* * *. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the court may not interfere with the exercise of the state's authortiy, unless confiscation is clearly established."

The real controversy here is whether one-tenth of one per cent of a railroad's gross revenue from domestic commerce, diminished to one-fifteenth of one per cent by deducting the license tax, does or does not unreasonably exceed the cost of railroad regulation in the state. We have pointed out that no unreasonable excess appears from the statute as a matter of law.

THE STATUTE NOT BEING VOID ON ITS FACE, THE BURDEN WAS ON APPELLANT TO SHOW AN ADMINISTRATIVE VIOLATION OF THE UNITED STATES CONSTITUTION. THE EVIDENCE DOES NOT SUSTAIN THAT BURDEN.

Appellant's assignments 4 (a), (b), (c) and (d) will be covered by our argument on this point. The position of appellant in this respect is stated in their assignment of errors (R. 107) as follows:

"(4) The supreme court of the State of Washington erred in holding and deciding that the evidence preponderated against the findings made by the trial court as to the cost of supervising and regulating railroads, * * *."

As a reading of the statutes does not show them to be unconstitutional, appellant's case must follow and the judgment of the Washington supreme court be affirmed, unless the evidence shows a violation of the United States constitution because of the actual administrative effect of the state laws. Such violation must also be clearly

established or the presumption that the statute and all administrative acts are valid will control. *Los Angeles G. & E. Corp. v. Railroad Com.*, 289 U. S. 287, 77 L. Ed. 1180; *Interstate Busses Corp. v. Holyoke Street Ry Co.*, 273 U. S. 75, 7 L. Ed. 530.

By the above assignment of error appellant objects to the Washington supreme court's decision reversing the trial court's findings. That, however, is a matter of no interest to this court. While the supreme court of the United States has appellate jurisdiction of both the law and the facts, it has no concern whatever with any controversy of the trial court's findings and conclusions or judgment. It must take the state law, the state rules of practice, the construction of the state's statutes and the ulimate conclusions of the state as it finds them unless the result violates the United States constitution.

With the above indispensable rule in mind, let us examine the facts to see, not that they do not preponderate against the findings of the trial court, but that they do not clearly preponderate against the conclusion of the state supreme court, for its judgment is the only one appealed, and, indeed, the only judgment appealable to this court.

The record at bar discloses that appellant relies principally upon a portion of a few documents admitted in evidence over respondent's objections as to their competency, relevancy and immateriality (R. 58, 60-63). The documents are the annual reports of the Department of Public Works covering the years in controversy and the Governor's inaugural address delivered at the beginning of his term of office January 16, 1929. (R.

62 and 63.) Appellant states the argument on the face of the case by setting out on page 43 of its brief, a table taken from Exhibit 5, page 78, showing $151,396.24 paid into the Public Service Revolving Fund in the year of 1933, by public service corporations other than railways and utilities. How this can prove the railroads to be over-charged is a mystery which appellant has not explained. Appellant is not competent to raise this point in behalf of the parties making the payments and who are not parties to the record. *Utah Power & Light Company v. Pfost*, 286 U. S. 165, 76 L. Ed. 1038, *supra*.

This table is followed by an excerpt from the governor's message set out in appellant's brief at page 4 (Trans. 63); the excerpt being merely a recommendation to the legislature by the governor is merely hearsay and therefore incompetent and inadmissible and should be ignored in considering the case. But even if considered, it does not support appellant's position, it merely shows that in 1929 and prior thereto the department of public works had not been self-supporting as to railroads and utilities. It does not show how much the railroads were indebted to that department for the regulating, nor does the appellant explain how such facts cause an injury to appellant.

The second paragraph of the excerpt shows that the governor wanted to make the transportation division of the department self-sustaining. Surely there is nothing illegal in such an idea of the executive. *Charlotte Etc. Railroad Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051, *supra*. It also shows the recommendation to abolish the public service revolving fund. This recommendation was

admittedly not carried out by the legislature, Laws of 1929, Chapter 107, Rem. Rev. Stat., 10417, *supra,* Brief of Appellant, pages 2 and 3. Whether admissible or not, it can have not even the slightest materiality or relevancy nor effect on the outcome.

Appellant follows the portrayal of these vague matters with the statement on page 35 of its brief, to the effect that in 1933 by Chapter 192, the legislature appropriated from the public service revolving fund $430,850. That appropriation act contained in addition to what appellant stated, the following clause: "(expenditures not to exceed fees heretofore or hereafter collected.)" Omitting this clause and showing a disregarded recommendation by the governor to the legislature urging the abolishment of the public service revolving fund are no reasons for concluding or even surmising that the railroads were over-charged. Neither is the statement in appellant's brief at pages 44 and 46 that all the $224,193.95 in the public service revolving fund at the close of 1933 was spent in 1934, material to the issue. If the appellant was not over-charged, it is immaterial how the residue of the fund was afterwards expended by the state officers. *Clark v. Poor,* 274 554, 71 L. Ed. 1199, *supra.*

After introducing the documentary evidence above mentioned, appellant called to the stand Mr. Stookey who for years had been auditor of the department, and over respondent's objection (R. 64) offered his testimony, whereupon the following occurred:

"Mr. C. S. Stookey, being a witness called on behalf of plaintiff, Northern Pacific Railway Company, after having been first duly sworn, testified as follows:

"Direct examination.

"By Mr. daPonte:

"Q. Mr. Stookey, you are the auditor of the Department of Public Works?

"A. I am.

"Q. You have the pay rolls, have you, of the department for the years 1929 to date?

"A. Yes, sir, I have the transcript.

"Q. State approximately the number of employees the department had in its various divisions for the years 1929 to date. I dont care for the exact number. If it varies from month to month, just state about how it was.

"Mr. Hannan: I object to that, your Honor, please, as being incompetent, irrelevant, and immaterial. The number on pay rolls in the various departments is immaterial in the matter. I object to the introduction of the testimony.

"The Court: It seems to me the objection is well taken. The only thing we are interested in here is whether this amount that is collected is in excess of necessary inspection fees.

"Mr. daPonte: No, Your Honor, that isn't the question we have here. We aren't going into that excerpt as shown by the record. Our position is that this is a flat fee levied to pay all of these activities, and that is an invalid act on its (fol. 84) face. It is supplementary to that, and I doubt if it is necessary to my contention, but I thought for re-enforcing the argument it would be necessary to show that. I am not going into the cost of regulating railroads. It couldn't be proven. There are no records available." (R. 64 and 65.)

Thereupon the witness testified as to the employees and general operation of the department. (R. 65-70.) None of the testimony so introduced in any way tended to show an excessive charge to the railroads nor the expense of regulating such transportation companies. In fact, the appellant disclaimed all intention to do so by the following statement of its counsel, Mr. daPonte:

"I am not going into the cost of regulating railroads. It couldn't be proven. There are no records available." (R. 65.)

Not having shown an excessive charge imposed upon appellant, the Washington supreme court was correct in overruling the trial court and ordering appellant's action dismissed.

Turning now to appellant's fifth assignment (R. 108) we find errors charged on the ground that the state supreme court did not find from the evidence that the expense of the department was largely caused by activities of a non-regulatory character. It appears to us that the record discloses no evidence to justify, let alone compel, such a finding.

Proceedings for reparation of railroad over-charges (R. 70), establishing rates, regulating service and proceeding before the interstate commerce commission on interstate rates where they affect intrastate rates and service are all matters connected with railroad regulation and proper activities of the state's regulatory department. *Charlotte Etc. Railroad Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051, *supra*.

In addition to this, a view of the evidence shows that the 1/10 of 1% fee reduced to 1/15 of 1% as hereinbefore explained was imposed on the railroads as a class for regulation and failed by $37,833.14 to cover the actual expense of their regulation during the five years involved. (R. 72.) In this computation made by the witness, many items of recognized regulatory expense were omitted, to-wit: No charges were made for legal services (R. 72 and 73) nor for auditing by the state auditor, nor by the department of efficiency (R. 73)

nor for the salary of the director of public works. (R. 75.) It was also shown that the regulatory expenses varied greatly from year to year. (R. 78.) The absence of such items shows that the fees might have been even higher and not have been excessive. *Pure Oil Co. v. Minnesota*, 248 U. S. 158, 63 L. Ed. 183, *supra*.

THE EVIDENCE IN THE CASE AFFIRMATIVELY SHOWS THAT THE APPELLANT WAS NOT OVERCHARGED BUT THAT IT WAS GROSSLY UNDERCHARGED BY THE STATE FOR REGULATION.

Here we will give attention to appellant's sixth and seventh assignments and discuss them together. The sixth charges error in admitting the testimony of the department's auditor, Mr. Stookey, and the seventh in the rendering judgment by the state supreme court.

Mr. Stookey, the auditor, was the only witness sworn. Appellant first called him and put in his testimony over respondent's objection. (R. 64.) Later, the same witness was called by the respondent upon the reopening of the case and his further testimony went in without objection by appellant. (R. 71-73):

"(At 2:15 p. m. on Thursday, January 3, 1935, the above entitled cases were reopened for the introduction of further testimony, and the following proceedings were had and testimony taken, to-wit):

"Mr. Hannan: Your Honor, at the reopening of the case, Your Honor ruled to permit me to introduce some testimony in defense. I call Mr. Stookey to the stand.

"Mr. C. S. Stookey, being a witness called on behalf of defendant, having been previously duly sworn, testified as follows:

"Direct examination.

"By Mr. Hannan:

"Q. You are the auditor of the department of public works? (fol. 93.)

"A. I am.

"Q. You are the man who testified for the plaintiffs here in this cause?

"A. Yes, sir.

"Q. How long have you been auditor of the department?

"A. Since June, 1920.

"Q. Mr. Stookey, have you made an examination of the records of the department for the years 1929, 1930, 1931 and 1932 and '33, in regard to the railroads?

"A. Yes, sir.

"Q. Have you made a computation as to how much the railroads have paid in those years and how much has been expended by the department on the railroad part of the Department of Public Works?

"A. Yes, sir.

"Q. Tell us what they are by years.

"A. Receipts, 1929 calendar year from the railroads, $30,640.12, and expenses chargable to railroads for the fiscal year April 1, 1929, to March 31, 1930, were $34,284.60. Receipts—(Interrupted.)

"Q. 1930?

"A. Calendar year 1930, $25,788.12; disbursements, 1930, fiscal year, $43,795.28. Receipts for 1931 calendar year, $19,953.57; disbursements for the 1931 fiscal year, $27,101.61. Receipts for the 1932 calendar year, $12,921.52; disbursements for the 1932 fiscal year, $24,856.90. Receipts for the 1933 calendar year, $12,247.58; disbursements for the 1933 fiscal year, $9,245.66.

"Q. Have you the total for all that?

"A. I have the accumulative excess of disbursements over (fol. 94) receipts for that period.

"Q. How much is it?

"A. Which amounts to $37,833.14.

"Q. Do your charges for disbursements include anything for legal services of the Attorney General's

office in regulating the railroads, or any of those other departments?

"A. No, sir, just for funds expended from our appropriations.

"Q. Did you consider anything for the consideration of the State Treasurer or State Auditor in regard to those funds in state regulation?

"A. No, sir.

"Q. Did you include anything for the auditing of the Department's books by the Department of Efficiency auditor?

"A. No, sir.

"Q. You got your figures from the books of the company?

"A. The Department of Public Works."

After cross-examination (R. 73 and 74) whereby appellant elicited no more favorable testimony from the witness his objection to the testimony was interposed. Manifestly, the objection was not timely made and of no effect whatever. After further direct and cross-examination (R. 74-81) the case was finally closed. The witness was an officer of the state and of the department charged with the regulation of public service corporations. His compilations and accounting in regard to the railroads were turned in to his superiors, and were kept as part of the public record of the office.

Appellant next argues that the above testimony introduced by the state was incompetent and should have been excluded and should now be disregarded. Appellant's brief, page 55, cites a quotation from the case of *Truax v. Corrigan,* 257 U. S. 312, 66 L. Ed. 254. A reading of that case makes manifest that it has no application to the question of admissibility or force of the evidence under discussion by appellant. In the *Truax* case, the

facts were pleaded and admitted and the case decided as a matter of law. In addition to the quotation set out in appellant's brief is found the following:

"We conclude that the demurrer in this case should have been overruled, the defendants required to answer, and that, if the evidence sustains the averments of the complaint, an injunction should issue as prayed."

On the other hand, in the case at bar all but formal allegations of the complaint were denied. (Brief of Appellant, page 7.) In view if the above distinction, appellant's quotation from the *Truax* case is of no importance and merely encumbers the record. The other authorities cited by appellant on the question of evidence, brief of appellant, page 54, are so foreign to the real point in issue that they merit no further consideration.

The testimony was properly held admissible by the supreme court of the state, whose holdings should be final on this point of the case, even though this court will, if necessary, go into the actual facts to determine whether the constitution of the United States has been violated. The testimony affirmatively and emphatically shows that legitimate regulation of the railroads cost many thousands of dollars more than the fees exacted from such railroads during the five years in issue.

Turning now to the question of the admissibility of the evidence objected to by appellant, we repeat no objection was made at the start but only after the evidence was admitted and cross-examination by appellant failed to bring out favorable facts. Manifestly, such a position as an objection to testimony was too late and therefore unavailing. Appellant then moved to strike the testimony from the record, which motion was overruled by

the trial court. (R. 74.) Appellant's petition for appeal does not raise the point or charge error upon overruling of his motion to strike the testimony, so this phase of it cannot be considered by this court.

In any event, the testimony was admissible. Underhill on Evidence, Section 142c, page 209, contains the following paragraph:

"To give an official character to a public record or register it is not essential that it should have been authorized or ordered to be kept by statute. It is the duty, if not the right, of every official to keep a record of his public transactions whenever such a practice is an appropriate and common mode of evidencing them. This record, whether required to be kept by statute or not, is a public record. The books themselves, being produced from the proper custody, should be received in evidence without authentication, unless it is affirmatively shown that they have been negligently or illegally kept."

At the trial no objection was made to the witness testifying as to his computations from the records. The motion to strike was because of hearsay. (R. 74.) Had that point been urged, the records themselves could have been put in, and not put appellee at the disadvantage that appellant seeks to have appellee placed in by this court. Under all circumstances of the case, the testimony was properly admitted and properly considered by the supreme court of the state.

The testimony affirmatively and emphatically shows that legitimate regulation of the railroads cost many thousands of dollars more than the fees exacted from such railroads during the five years in issue. However, if this testimony is inadmissible and disregarded all testimony in the case is inadmissible and must be disre-

garded. In such an event, appellant would fall back solely on the face of the statute, which is valid because of its intents and purposes as we have hereinbefore demonstrated.

CONCLUSION

The statutes involved are valid on their face, thereby leaving the burden upon the plaintiff and every presumption in favor of the state. The evidence admitted did not rebut the presumption but it did make the position of the state conclusive. No burden on interstate commerce having been shown the commerce clause of the United States was not violated. As all parties of a reasonable class with the railroads came under the statute, no due privilege was withheld and no equal protection of the laws of the state denied. Neither was the due process clause violated.

The constitution of the United States was not violated by the administration of the statutes in question. The opinion and judgment of the supreme court of the State of Washington reversing the trial court and ordering a dismissal of the actions were in all things proper and should be affirmed by this court.

Respectfully submitted,

G. W. HAMILTON,
Attorney General,

GEO. G. HANNAN,
Assistant Attorney General,
Attorneys for Appellee.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935, No. 878
OCTOBER TERM, 1936

No. 20

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

184 Wash. 648, 52 Pac. (2d) 1274

ADDITIONAL BRIEF OF APPELLEE

G. W. HAMILTON,
Attorney General,

GEO. G. HANNAN,
Assistant Attorney General,

Attorneys for Appellee.

Office and Postoffice Address: Temple of Justice, Olympia, Washington

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Laws of 1929, chapter 227, sec. 8, Rem. Rev. Stat., 3836-8 8

Rem. Rev. Stat., sec. 10434 14

IN THE

SUPREME COURT

OF THE

UNITED STATES

GREAT NORTHERN RAILWAY COMPANY,
Appellant,
vs.
STATE OF WASHINGTON, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

184 Wash. 648, 52 Pac. (2d) 1274

ADDITIONAL BRIEF OF APPELLEE

This additional brief is submitted in compliance with the request of the court to "file additional and clarifying briefs preparatory to oral argument on Monday, December 7, 1936." As the court has not specified any particular points which it desires clarified in this additional brief we may fail to add anything of value to appellee's original brief.

SUMMARY OF ARGUMENT

In addition to the reasons set out in appellee's original brief, the judgment of the Washington supreme court should be affirmed for the following reasons:

(a) All relative statutes should be construed together.

(b) The statutes involved are apparently valid and fair.

(c) No excessive fees or charges are imposed on utilities.

(d) Regulatory fees are operating expenses reflected in rates.

(e) Regulatory costs and expenses may be taxed against the utility.

(f) The Washington department of public works was authorized to cooperate with the interstate commerce commission.

(g) The department of public works had jurisdiction over reparation cases to recover excess railroad charges.

(h) The evidence shows that costs of regulating railroads far exceeded the fees imposed therefor.

ARGUMENT

Appellant sued the State of Washington to recover back a fee based upon their gross revenue from intrastate transactions for each year involved. This fee was imposed under Laws of 1929, chapter 107, section 1, Rem. Rev. Stat., 10417, which statute is set out at the top of page 8, brief of appellee, but for convenience we will copy it here. It is as follows:

"Section 1. That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under chapter 248 of the Laws of 1927, shall, on or before the first day of April of each year, file with the department of public works a statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue; *Provided*, That the fee so paid shall in no case be less than ten dollars."

Appellant's contention was and is that the statute is unconstitutional because violative of the commerce clause and the 14th Amendment of the United States constitution. The controversy involves the fees paid for the years 1929, 1930, 1931, 1932, and 1933. In each of these years, the percentage imposed by the statute was the same, the only difference being in the amount of the gross intrastate revenue upon which the fee was figured, and the consequent difference in the fee. Such being the case, for convenience the cause of action involving the year 1933 only is discussed. The same disposition must be made of the fee for each of the other years.

All during the years involved all corporations doing intrastate business in the State of Washington, whether public service or not, were required to pay for the privilege of so doing a certain tax or fee under chapter 227, Laws of 1929, Rem. Rev. Stat., sections 3836-1 to 3836-10 inclusive. Under these statutes the fee charged to appellant for the year 1933 was the sum of $985.60 (R. 41). Section 8, chapter 227, being Rem. Rev. Stat., section 3836-8, is as follows:

> "Sec. 8. That the annual fee required to be paid to the department of public works by any public service company shall be deducted from the annual license fee provided herein and the excess only shall be collected."

This section requires the $985.60 to be set off against the fee of 1/10th of 1% amounting to $3,137.04, imposed for regulatory purposes under chapter 107, Laws of 1929, Rem. Rev. Stat., section 10417, *supra.* (Brief of appellee pages 12-13, R. 43 and 122.) It will be seen by the above that appellant's account with the State of Washington for the year 1933 was and should have been computed as follows:

Regulatory fee 1/10th of 1%	$3,137.04
Less privilege tax allotted against it under Laws of 1929, chapter 227, Rem. Rev. Stat., §§ 3836-4-5-6-8	985.60
Balance for cost of regulation	$2,151.44

The above sum of $2,151.44 is approximately 1/15th of 1% of appellant's gross operating revenue from intrastate transportation for the year 1933. (R. 122) It is this balance that appellant claims is excessive. There can be made no better argument against appellant and in behalf of appellee and the validity of the involved statutes

than the opinion of the Washington supreme court in reversing the trial court, which opinion appellant asks this court to reverse. We can only hope to supplement that opinion to some extent. The opinion in full is found in the record (R. 85-93), and reported in 184 Wash. 648.

Appellant's pleadings and brief deal at length with prior statutes of the state imposing regulatory taxes upon public service corporations. (R. 1-34. Brief of appellant, pages 2, 3, 22, 23.) Such former statutes, however, being superseded by the one now in effect, are immaterial. Appellant's position is based solely upon the claimed unconstitutionality of chapter 107, Laws of 1929, Rem. Rev. Stat., section 10417, *supra*. If this statute violates the United States constitution then the decision of the supreme court of the state will be reversed. On the other hand, if this statute is constitutional the decision of that court is correct and should be affirmed.

It will be noted that the statute excepts "auto transportation companies and steamboat companies holding certificates under chapter 248, Laws of 1927." This latter statute is found in Rem. Rev. Stat., section 10361-2. It reads in part as follows:

"Every steamboat company holding a certificate under this act, shall between the first and fifteenth days of March of each year file with the Department of Public Works, a statement showing the gross operating revenue of such company for the preceding calendar year, or portion thereof, and shall pay to the said department a fee not to exceed one-fifth of one per cent of the amount of such gross operating revenue: * * *"

The rest of the statute requires an adjustment of the fees to the whole cost of regulating the steamboats thereunder, but as the statute authorizes steamboats to be

charged up to as high as one-fifth of one per cent the railroads do not appear to be discriminated against because of the terms of the Laws of 1929, chapter 107, Rem. Rev. Stat., section 10417, *supra.*

Regulatory Fees Are Operating Expenses

Appellant claims Laws of 1929, chapter 107, Rem. Rev. Stat., section 10417, to be unconstitutional and void because the fee imposed thereby is excessive. No other reason is given. We think we have sufficiently disposed of this claim in our original brief. Furthermore, as appellant is a public service corporation only gross excessiveness in regulatory fees could be material. Taxes, fees and costs of regulation hearings are legitimate operating expenses of a utility and are always reflected in the rates of the utility which should be high enough to cover them. In addition to the case cited on page 16 of our brief, on this point, we wish to call attention to the case of *State ex rel. Seattle v. Public Service Commission,* 114 Wash. 646, 195 Pac. 1015, which shows that taxes, and therefore fees, and charges of that class are allowed as operating expenses in the fixing of rates. They are therefore refunded to the utility in that manner.

Cost of Regulation May Be Charged to Utility

The leading case on the right of a state to charge the regulatory expenses of a public utility to the utility is *Charlotte C. and A. R. Co. v. Gibbs,* 142 U. S. 386, 35 Law Ed. 1051, which was cited in appellee's brief on pages 14, 19, 28 and 31. Though the decision in that case was rendered as early as 1892 it has been neither overruled nor criticized. Since its rendition it has been repeatedly approved and cited in many cases among which are the

following: It was cited and followed in *Consolidated Coal Co. v. People of the State of Illinois,* 185 U. S. 203 at page 207, 46 Law Ed. 872 at page 876. The statute of Illinois required the inspection at least four times a year of all coal mines employing five or more persons and fixed the fee at not less than $6.00 nor more than $10.00 for each inspection. The fees were used to pay the inspectors' salaries and this court affirmed the Illinois supreme court in holding the statute valid.

The *Gibbs* case was also cited in *New York and Northeastern Railroad Co. v. Town of Bristol,* 151 U. S. 556 at page 571, 38 Law Ed. 269 at page 274. There was involved in that case an order of the state railroad commission requiring a railroad doing both interstate and intrastate business to eliminate a grade crossing. The state supreme court held the act within the regulatory powers of the commission and that the expense was properly chargeable solely to the railroad corporation. In the opinion of this court affirming the state court is found at page 571, the following:

"The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial or infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts

required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that, in such particulars, a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States. *Nashville, C. and St. L. R. Co. v. Alabama*, 128 U. S. 96 (32:352); *Georgia R. and Bkg. Co. v. Smith*, 128 U. S. 174 (32:377); *Minneapolis and St. L. R. Co. v. Beckwith*, 129 U. S. 26 (32:585); *Dent v. West Virginia*, 129 U. S. 114 (32:623); *Charlotte, C. and A. R. Co. v. Gibbs*, 142 U. S. 386 (35:1051); *Minneapolis and St. L. R. Co. v. Emmons*, 149 U. S. 364 (37:769). Judgment affirmed."

Department's Cooperation with Interstate Commerce Commission Was Authorized

Appellant's brief, pages 23-27, sets out and is devoted to the trial court's finding that the department of public works participated in cases with and before the interstate commerce commission and in reparation cases to recover for the shippers the over-charges of common carriers. In this appellant is unmindful that the state supreme court repudiated the trial court's findings. Be that as it may, the quoted findings show that the case before the interstate commerce commission involved railroads of the state of Washington and the court will take judicial notice of the fact that a railroad from Homestead, Oregon, to Lewiston, Idaho, would naturally lie across part of the state of Washington and be used in intrastate commerce.

When the witness Stookey, auditor of the department of public works, was on the stand and being examined by appellant's counsel relative to proceedings be-

fore the interstate commerce commission, the following occurred:

"* * * Q. You made no attempt to ascertain the cost of litigation the Department is carrying on before the Interstate Commerce Commission of late years?

"A. No.

"Q. It has participated in the cases before the Commission, hasn't it?

"A. Yes, sir.

"Q. Those were expensive proceedings, going on for many years?

"Mr. Hannan: I am———

"A. I know there has been a bunch. Docket 17,000.

Mr. daPonte:

"Q. It has been going on for a number of years?

"A. Yes.

"Q. Mr. Stookey, you didn't finish giving—Yes, you gave us the employes for the various years, didn't you?

"A. Yes.

"Mr. da Ponte: That will be all of the plaintiff's with the understanding that when the 1934 reports are in, we can file that.

By Mr. Hannan:

"Q. Mr. Stookey, Docket 17,000 was a railroad case, wasn't it, involving railroad fees?

"A. Yes, I always assumed it was a railroad case.

"Mr. daPonte: It was.

Mr. Hannan:

"Q. What do you mean by reparation cases? I believe you testified on direct there were some reparation cases.

"Mr. daPonte: I agree with you those reparation cases were brought to recover refund on excessive charges.

"Mr. Hannan: And those involved railroads, also.

"Mr. daPonte: Yes. * * *." (R. 69-70).

Proceedings before the interstate commerce commission involving the railroads of the state were authorized by law and were within the jurisdiction of the department of public works. *Northern Pacific Railway Co. v. The Department of Public Works,* 136 Wash. 389, 240 Pac. 362.

THE DEPARTMENT WAS VESTED WITH JURISDICTION OVER REPARATION CASES TO OBTAIN REFUNDS OF OVERCHARGES MADE BY COMMON CARRIERS

Rem. Rev. Stat., section 10434, though subsequently amended was during the years involved, as follows:

"Sec. 10434. *Refunds and overcharges—Determination by Director of Public Works.* The director of public works shall have power and it shall be his duty, upon complaint in writing being made to him, to determine the amount of overcharge made and refund due in all cases where any public service company, as defined in this chapter, charges an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, or which may thereafter be declared to be the legal rate which should have been applied to the service rendered, and to determine to whom the overcharge should be paid: Provided, that this act shall not apply to controversies arising in relation to contracts in existence prior to the taking effect of this chapter." *Northern Pacific Railroad Co. v. Sauk River Lumber Co.,* 160 Wash. 691, 295 Pac. 926.

THE EVIDENCE SHOWS THAT THE COST OF REGULATING RAILROADS DURING THE PERIOD INVOLVED EXCEEDED STATUTORY FEES IMPOSED THEREFOR

Appellant made no showing of the cost of regulating railroads in the state of Washington (R. 64-65). On the other hand appellee introduced evidence showing that the actual cost of such regulation for the years involved greatly exceeded the fees exacted of the railroads there-

for (R. 72-82). Appellant made no objection to the admission of such evidence until after cross-examination (R. 72-74). The supreme court of the state considered the evidence admissible and preponderating in appellee's favor (R. 91). This court will accept the state court's position as to admissibility. *Cleveland C. C. & St. Louis R. Co. v. Backus*, 154 U. S. 439, 38 L. Ed. 1041.

CONCLUSION

We wish to conclude by reminding court and counsel that this is a law action to recover fees claimed to be excessive, and that the burden is on appellant to make its case. It has shown neither that the statute is void on its face nor that the fees imposed thereby are excessive. Not having done so no administrative invalidity can be presumed. It necessarily follows that the judgment of the Washington supreme court should be in all things affirmed.

Respectfully submitted,

G. W. HAMILTON,
Attorney General,

GEO. G. HANNAN,
Assistant Attorney General,
Attorneys for Appellee.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. 878

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

(184 Wash. 648, 52 Pac. (2d) 1274)

PETITION FOR REHEARING

G. W. HAMILTON,
Attorney General,

GEO. G. HANNAN,
Assistant Attorney General,

Attorneys for Appellee.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

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PETITION FOR REHEARING

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Comes now the appellee by its attorneys of record herein and moves and petitions the court that the decision of the court in this cause rendered herein on the first day of February, 1937, be set aside and that counsel be granted leave to re-argue the cause on the merits.

Our reason for making this petition for a rehearing is our firm belief that the decision of the court is wrong. In accusing the court of error we also accuse ourselves of not properly presenting the case for had the case been properly presented and argued surely the court would have reached a proper conclusion.

ISSUES

In the trial court, upon defendants' objection to testimony as to the number of persons employed by the department of public works of the State of Washington, the following occurred: (R. 64-65)

"MR. HANNAN: I object to that, your Honor please, as being incompetent, irrelevant, and immaterial. The number on pay rolls in the various departments is immaterial in the matter. I object to the introduction of the testimony.

"THE COURT: It seems to me the objection is well taken. The only thing we are interested in here is whether this amount that is collected is in excess of necessary *inspection* fees.

"MR. DAPONTE: No, Your Honor, that isn't the question we have here. We aren't going into that except as shown by the record. Our position is that this is a flat fee levied to pay all of these activities, and that is an invalid act on its (Fol. 84) face. It is supplementary to that, and I doubt if it is necessary to my contention, but I thought for reenforcing the argument, it would be necessary to show that. I am not going into the cost of regulating railroads. It couldn't be proven. There are no records available.

"THE COURT: All right."

Again, in the trial court, one of appellant's attorneys, Mr. daPonte, objected to testimony offered by defendant as to the cost of regulating the railroads and in open court stated as follows:

"My contention is that the law is invalid on its face, is the point I made, and I didn't go into the cost of operating railroads, or the way it is distributed, or the expense." (R. 82)

The above quoted statements amount to a waiver of all points but the claimed invalidity of the statute. No other issue was presented. In the face of such statements by appellant's counsel in the trial court, when this court arrived at the conclusion that the law was not void on its face, the inquiry should have been considered closed, the controversy at an end and the judgment of the supreme court of the State of Washington affirmed. No other logical course was open. All further discussion was superfluous and may have caused the court to mislead itself.

REGULATION AND INSPECTION

The case at bar involves the inspection laws of neither the State of Washington nor of the United States. The inspection clause of the United States constitution was not pleaded. In spite of some loose expression such as regulation and inspection by the trial court the case was not tried as involving inspection laws. "Inspection" was injected into the case in the brief and argument drawn by appellants and signed by the trial court under the guise of findings and conclusions to make use of the case of *Foote v. Stanley*, 232 U. S. 494, 58 L. Ed. 698, which is not in point. Manifestly cases on inspection laws are useful only for illustration and comparison. Controlling the present case by the *Foote* case puts the *Foote* case on the wrong foot. The case at bar is controlled by *Charlotte C. & A. R. Co. v. Gibbes*, 142 U. S. 386, and similar cases.

There is a vast difference between the state's inspection charges, the surplus of which belongs to the federal government under the United States constitution, and the state's charges for regulation in the exercise of its police power which charges are reflected in rates and thereby returned to the utility regulated. The rules of the one are not applicable to the other.

BURDEN OF PROOF.

Neither is the *Foote* case nor other cases cited in the opinion in point on the burden of proof and its assumed shift upon the state, when the facts and issues are analyzed. In the *Foote* case the statute ordered and the pleadings admitted the illegal expenses paid out of the inspection fund. No such situation presents itself in the case at bar. When speaking on this subject and referring to the testimony of the department's auditor this court, in its opinion, made the following statement:

"* * * At the close of plaintiff's case, the defendant recalled the auditor as its own witness. He testified that the disbursements chargeable to the railroads for the period 1929 to 1933, inclusive, exceeded the receipts from railroads in the same period by $37,833. He did not, however, qualify what he had previously stated, that, in making up these figures, he had lumped all railroad charges, whether for inspection and regulation or interstate commerce cases or reparation cases. * * *."

The facts that the witness had "previously stated" are found in the record at pages 68 and 69. They merely show no segregation of expenses between the I. C. C. cases, rate hearings and reparation cases. Such commingling, when properly analyzed under the state law and the decisions of this court, cannot shift the burden. The I. C. C. has jurisdiction of intrastate rates and regulations when necessary to the regulation of interstate commerce. In such cases the participation of the state department is surely lawful. Reparation matters, when involv-

ing intrastate overcharges and intrastate rate hearings, are also within the state jurisdiction. There being no testimony showing that any of the expenses were outside of this legal field, the now unrebuttable presumption must be that all were valid and within the state's authority.

This court is bound by a state's court construction of state laws. The Washington public service law is restricted to intrastate matters. In construing that law in the case of *State ex rel. Chicago, Milwaukee & St. Paul R. Co. v. Public Service Commission*, 94 Wash. 274, a case we failed to cite in our brief, the state supreme court used at page 289 the following language:

"* * * But appellant argues that the language of the rule is broad enough to apply to cars ordered for both kinds of commerce, and that therefore the court cannot construe either it or the law as not intended so to apply. Such an argument, if applied to each of the various provisions of our railroad commission law, would defeat many of them as attempts to invade the power of Congress to regulate interstate commerce. Many of these provisions, standing alone, are couched in language broad enough to cover both kinds of commerce. But inasmuch as the dominant purposes of the act, to be gathered from all of its provisions, was merely to regulate intrastate commerce, it seems to us but reasonable to hold that this dominant purpose should be read into all of its provisions. * * *."

Applying the above to the case at bar any activity beyond an intrastate regulation is unauthorized. Any endeavor to do so would be

merely an unauthorized or unlawful act by the state officers and would not bind the state. If a violation of law makes the violated law invalid all laws are void and nothing but anarchy can exist. This court has never approved of such a doctrine but has always taken the opposite position. In the case of *Clark v. Poor*, 274 U. S. 554, in discussing this point, the court said:

"* * * It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the commission in the administration or enforcement of the act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

Appellant had the right to try its cause as it saw fit. It chose to waive all points but the claimed invalidity of the statute taken at its face value. (R. 65-65 and 82, *supra.*) That restriction of the issues the court has evidently overlooked or underestimated in rendering its opinion; but the dissenting opinion alludes to it though it was not properly stressed in appellee's brief. (Brief of Appellee, 30-31.)

The case at bar is of great importance to the State of Washington and every other state in the Union. It is vital to an understanding of our system of government by duel sovereignty. The time is not yet when the states are only sections of the

Union nor have they yet lost their police power and sovereignty over matters within their border.

Furthermore, the United States constitution does not contemplate such a result. Nowhere does it authorize or allow the federal government to dictate rules of evidence and procedure to enforce the police power of the state. To do so would cause a destruction of state sovereignty and also the Union, for a destruction of the units must of necessity work a destruction of the Union. This court has always frowned upon such attempts of Congress. It will be equally zealous in protecting state sovereignty from its own acts.

In view of the foregoing we respectfully petition and pray for a rehearing and re-argument of the issues in this cause.

Respectfully submitted,

G. W. HAMILTON,
Attorney General,

GEO. G. HANNAN,
Assistant Attorney General,

Attorneys for Appellee.

STATE OF WASHINGTON }
County of Thurston } ss.

We, G. W. HAMILTON, Attorney General, and GEO. G. HANNAN, Assistant Attorney General, and each of us hereby certify that the above and foregoing petition for rehearing in the above entitled cause is submitted and presented in good faith and not for delay.

G. W. HAMILTON,
Attorney General,

GEO. G. HANNAN,
Assistant Attorney General,

Attorneys for Appellee and Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1936.

Great Northern Railway Company, Appellant, *vs.* The State of Washington. } Appeal from the Supreme Court of the State of Washington.

[February 1, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of Washington [1] in an action brought by the appellant to recover fees for the years 1929-1933 paid under protest to the State Department of Public Works. The relevant statutory provisions are:[2]

"Section 1. That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under chapter 248 of the Laws of 1927, shall, on or before the first day of April of each year, file with the department of public works a statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue: *Provided*, That the fee so paid shall in no case be less than ten dollars."

"Sec. 2. All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the state treasurer, and by him deposited in a fund to be known as the public service revolving fund."

The Supreme Court of the State has defined the exaction as a regulatory or inspection fee, and has declared that the fund created by the sums collected must be used solely for administering the State public service commission law.[3]

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[1] 184 Wash. 648, 52 Pac. (2d) 1274.

[2] C. 107 Washington Session Laws of 1929. (Remington's Revised Statutes §§ 10417, 10418.) This act amended § 1 of c. 113 of the Laws of 1921, as amended by § 1, c. 107 of the Laws of 1923. It left § 2 of c. 113, Laws of 1921, in effect.

[3] *Pacific T. & T. Co.* v. *Seattle*, 172 Wash. 649, 21 Pac. (2d) 721; affirmed on other questions, 291 U. S. 300. See also the opinion below, 184 Wash., pp. 650, 651, 52 Pac. (2d) p. 1275.

The complaint [4] alleges that the Department of Public Works exercises jurisdiction and supervision over sundry public utilities, including common carriers by rail, electric and street railways, gas, electrical and water companies, telegraph and telephone companies, wharfingers, warehousemen, and carriers by water, engages in many activities disconnected from, and unrelated to, the inspection and supervision of rail carriers, and has a variety of duties in the enforcement of the State's police power. The complaint affirms that the fee is not based upon or restricted to the cost of legitimate regulation or supervision but is used to defray the costs of other activities in connection with railroads and also of supervising and inspecting unrelated public utilities and of performing other duties the expense of which cannot legitimately be imposed upon carriers by rail; that the fee is grossly in excess of the reasonable cost of inspection and regulation of railroads; that, to January 1, 1933, there had accumulated from the fees collected more than $250,000 in excess of the amount expended by the department in the discharge of all its duties; that the statute is in truth a revenue measure; that the State taxes plaintiff's property and other like property on an *ad valorem* basis. The complaint charges that the fee is a burden on, and a regulation of, interstate commerce in violation of Article I, Section 8 of the Constitution; is so arbitrary, excessive, diseriminatory and unequal as to deny the plaintiff equal protection of the laws and to deprive it of property without due process of law, in violation of the Fourteenth Amendment.

The answer admits plaintiff's payment under protest; admits that the Department of Public Works exercises jurisdiction and supervision over many classes of public utilities, including common carriers, and that the plaintiff's property within the State is assessed on an *ad valorem* basis for taxes like other property; admits plaintiff's capacity to sue, but denies substantially all other allegations of the complaint.

The case was tried without a jury. The evidence largely consisted of the annual reports of the department. By the uncontradicted evidence and by the relevant statutes the following facts were established. The department has jurisdiction of various classes of public utilities, including railroads, electric and

[4] The complaint as filed sought recovery also of sums paid pursuant to other statutory provisions. The appellant, however, abandoned these items of claim.

street railways, gas, electric and water companies, telegraph and telephone companies, wharfingers, warehousemen, and carriers by water, in respect of which it exercises many regulatory and supervisory duties. As respects railroads, the department constantly exercises functions unrelated to inspection and supervision, including the statutory duties of taking part in litigation before the Interstate Commerce Commission affecting the citizens of the State, and of acting judicially in decreeing refunds of overcharges. These functions, unrelated to the inspection and regulation of railroads, entail large expense. Between 1929 and 1933 the legislature made no appropriation from the State's general fund for the expenses of the department's activities, all being paid indiscriminately out of the department's fund derived from the fees collected from businesses subject to its jurisdiction. During this period the surplus accumulated from such receipts was $224,193.95, which was expended in 1934 in carrying on investigations of, and litigation with, public utility corporations other than railroads. No separate accounts are kept, or required by law to be kept, with respect to the expense of these various activities, and it is impossible to determine from the records and accounts of the department the expense of inspecting and regulating railroads separate and apart from the expense of regulating other utilities or other functions of the department.

The plaintiff called the department's auditor who testified that the charge of one-tenth of one per cent of gross income collected from utilities goes to build up a fund from which all the department's expenses are paid; that he had figures classifying the expenditures according to the various kinds of utilities with which the department is concerned. These calculations he had made for himself, there being no duty under the law to keep accounts on this basis. He testified that, in computing the expenditures in connection with railroads, he lumped them as railroad charges and made no separation of the costs of inspection and regulation, the costs of rate-hearings, and the costs of reparation proceedings, although the evidence establishes that many of the railroad charges had to do with reparation cases and litigation before the Interstate Commerce Commission. At the close of plaintiff's case, the defendant recalled the auditor as its own witness. He testified that the disbursements chargeable to the railroads for the period 1929 to 1933, inclusive,

exceeded the receipts from railroads in the same period by $37,833. He did not, however, qualify what he had previously stated, that, in making up these figures, he had lumped all railroad charges, whether for inspection and regulation or interstate commerce cases or reparation cases. Upon cross-examination it developed that the figures he submitted were not official, and, so far as they covered salary items, had been made up from slips which the various employes, at his request, had turned in monthly allocating the time each employe spent in the various branches of the work, and the witness had no personal knowledge of the accuracy of these slips. Plaintiff objected to the testimony and moved to strike it on the ground that it was hearsay but the court let it stand, subject to the objection. A judgment awarded the plaintiff by the trial court was reversed by the Supreme Court.

The principles governing decision have repeatedly been announced and were not questioned below. In the exercise of its police power the state may provide for the supervision and regulation of public utilities, such as railroads; may delegate the duty to an officer or commission; and may exact the reasonable cost of such supervision and regulation from the utilities concerned and allocate the exaction amongst the members of the affected class without violating the rule of equality imposed by the Fourteenth Amendment.[5] The supervision and regulation of the local structures and activities of a corporation engaged in interstate commerce, and the imposition of the reasonable expense thereof upon such corporation, is not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution.[6] A law exhibiting the intent to impose a compensatory fee for such a legitimate purpose is *prima facie* reasonable.[7] If the exaction be so unreasonable and disproportionate to the service as to impugn the good faith of the law[8] it cannot stand either under the commerce clause or the Fourteenth Amendment.[9] The state

[5] *Charlotte, etc. Railroad Co.* v. *Gibbes*, 142 U. S. 386; *New York* v. *Squire*, 145 U. S. 175, 191.

[6] *Atlantic, &c. Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Mackay Tel. Co.* v. *Little Rock*, 250 U. S. 94, 99.

[7] *Western Union Tel. Co.* v. *New Hope*, 187 U. S. 419, 425; *Pure Oil Co.* v. *Minnesota*, 248 U. S. 148, 162.

[8] *McLean* v. *Denver & R. G. R. R. Co.*, 203 U. S. 38, 55. Compare *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380, 393. *Western Union Tel. Co.* v. *New Hope*, *supra*.

[9] *Brimmer* v. *Rebman*, 138 U. S. 78, 83; *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U. S. 64; *Pure Oil Co.* v. *Minnesota*, *supra*, p. 162.

is not bound to adjust the charge after the fact, but may, in anticipation, fix what the legislature deems to be a fair fee for the expected service, the presumption being that if, in practice, the sum charged appears inordinate the legislative body will reduce it in the light of experience.[10] Such a statute may, in spite of the presumption of validity, show on its face that some part of the exaction is to be used for a purpose other than the legitimate one of supervision and regulation and may, for that reason, be void.[11] And a statute fair upon its face may be shown to be void and unenforceable on account of its actual operation.[12] If the exaction be clearly excessive it is bad *in toto* and the state cannot collect any part of it.[13]

The contention is that the challenged statute is void on its face since it discloses that the fee charged the appellant is not imposed for, or limited by, the reasonable cost of supervision or regulation of its business; and, if this is not so, the case made in respect of the act's operation cast on the appellee the burden of proof, which it failed to carry.

The Supreme Court of the state based its decision in favor of the validity of the statute on two grounds: First, that the act is not unconstitutional on its face; secondly, that, as the answer denied the material allegations of the complaint concerning the operative effect of the act, the plaintiff had the burden of proof, which it failed to sustain; and, if the burden was shifted by the case made by the plaintiff, the evidence preponderated in favor of the defendant.

First. The statute does not exhibit a failure reasonably to adjust the fee to the expense of the supervision and regulation of railroads. The legislation is to be accorded the presumption of fairness and regularity. It cannot be deduced from the provisions of the act that the amounts collected from the railroads grossly exceed those legitimately expended for inspection and regulation. The appellant insists that such is the necessary inference

[10] *Atlantic &c. Tel. Co.* v. *Philadelphia, supra,* p. 164; *Postal Telegraph-Cable Co.* v. *Taylor, supra,* p. 69. *Foote & Co., Inc.* v. *Stanley,* 232 U. S. 494, 503, 504.

[11] *Foote & Co., Inc.* v. *Stanley, supra,* p. 505; *Lugo* v. *Suazo,* 59 F. (2d) 386.

[12] *Western Union Tel. Co.* v. *New Hope, supra,* p. 425; *Foote & Co., Inc.* v. *Stanley, supra,* p. 507.

[13] *Postal Telegraph-Cable Co.* v. *New Hope,* 192 U. S. 55; *Foote & Co., Inc.* v. *Stanley, supra,* p. 508.

from the circumstance that the same fee is exacted from public utilities generally, and the collections go into a single fund and are indiscriminately disbursed for the many branches of the department's work. But these facts, without more, do not prove that the amounts derived from the railroads are in excess of the legitimate expenses of inspection and regulation. It may be that, in spite of this lumping of receipts and expenditures, the fees paid by the railroads are no more than enough to defray such expenses. The court below was, therefore, justified in refusing to hold the statute void on its face.

Second. The court thought the plaintiff had the burden of showing that the sums exacted from rail carriers substantially exceeded the amounts expended for regulation and supervision, and the proofs offered were insufficient to shift the burden to the defendant. This view was erroneous. *Foote & Co., Inc.* v. *Stanley,* 232 U. S. 494.

In that case it appeared that the plaintiffs were packers of oysters taken from the waters of Maryland, Virginia, and New Jersey, and shipped to Baltimore. A statute of Maryland required that the oysters be inspected at Baltimore. It imposed a charge of one cent a bushel "to help defray the expenses of such inspection and the other expenses of the State Fishery Force, upon all oysters unloaded from vessels at the place where said oysters are to be no further shipped in bulk in vessels." The plaintiffs refused to pay the exaction and, upon threat of enforcement, filed a bill in a state court for injunction alleging the fee was excessive, a burden on interstate commerce, and a violation of the constitutional provision that "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." The Maryland Court of Appeals affirmed a decree dismissing the bill and this court reversed its decision. The plaintiff asserted that as the act laid the fee for the expense of inspection, "and other expenses", it was obvious that the state had provided for the collection of more than was necessary for inspection. To this the state answered that the section levying the fee was but a part of an elaborate system of inspection imposed upon the state fishery force. It appeared from the evidence, as it does here, that the fishery force had duties other than those of inspection which were to be paid for out of the fund produced by the fees. This court said (p. 503):

"But while the two duties may sometimes overlap, there is a difference between policing and inspection, and if the State imposes upon one set of officers the performance of the two duties and pays the whole or a part of the joint expenses out of inspection fees, *it must be made to appear that such tax does not materially exceed the cost of inspection — the burden in such cases being on those seeking to collect the combined charge.*"

And said further (p. 506):

"But the commingling of these various duties, paid for out of a fund raised for inspection, does not necessarily show that the fee is excessive. For the presumption of invalidity arising from such intermingling might be met by carrying the burden of showing that, while the statute required payment out of such joint fund, the collections were not sufficient, but only helped, to pay the definitely ascertained expenses of inspection. The question of reasonableness, therefore, may be considered in the light of the practical operation of the law with a view of determining, with reasonable certainty, the permanent relation between the amount collected and the cost of inspecting."

The court examined the evidence as to the operation of a prior law which levied the same charge per bushel and which the challenged act superseded, consisting of the annual reports of the comptroller, and found therefrom that one-third of the amount collected was sufficient to pay the cost of inspection and the other two-thirds had been appropriated to "other expenses of the Fishery Force." In the light of the operation of the previous act, and the failure of the state to show that the amount collected under the new law would not be more than was necessary for the expenses of inspection proper, the challenged statute was held void.

There are factual distinctions between the cited case and the instant one, but they do not affect the binding authority of the former. The law under consideration in the *Foote* case was purely an inspection measure. That here under review is characterized by the state court as one for regulation and inspection. The specific mandate of the federal Constitution limiting state inspection fees to an amount absolutely necessary for executing a state's inspection laws was treated in the *Foote* case as raising the same issue as was presented in earlier decisions with respect to the bearing of the commerce clause upon the imposition of regulatory and inspection fees imposed upon local property of interstate enterprises. And the cases decided under the commerce clause dealing with the

reasonableness of regulation and inspection fees have been treated by this court as apposite to the guarantees of the Fourteenth Amendment. In the *Foote* case reference to the accounts and records kept by state authority disclosed the extent of the excess of receipts over expenditures, whereas here it is demonstrated that while expenses other than those of inspection and regulation of railroads are paid out of the fees, the amount of the excess over what is necessary for regulation and inspection cannot be ascertained from the department's accounts. The *Foote* case is authority that in such circumstances the burden is on those seeking to collect the charge.

The State Supreme Court, after holding that the plaintiff failed to carry its burden, and that no duty of showing the amount necessary for inspection and regulation of railroads lay upon the defendant, proceeded to discuss the evidence and reached the conclusion that the proof preponderated in favor of the defendant. This conclusion was based upon the testimony of the department auditor that he had found from memoranda furnished him, and data collected by him, what had been expended in connection with railroads exceeded what they had paid. As already noted the appellant insists that this evidence was inadmissible and lacked value because hearsay.

The state court said:

"While the account kept by the auditor was not official, in the sense that of itself it was admissible in evidence, yet what the auditor did in that respect qualified him to testify as to the ultimate fact. Without further detailing the evidence, we will say that in our opinion, and in so far as there was any evidence on the subject, it preponderated against the findings made by the court as to the cost of supervising and regulating railroads."

Passing the appellant's contention that a federal right may not be denied under the guise of the application of a state rule of evidence,[14] we come to the question whether, when the asserted right has been denied, this court is concluded by a finding of fact or a mixed finding of law and fact made by the state court. We have repeatedly held that in such case we must examine the evidence to ascertain whether it supports the decision against the claim of federal right.

[14] Compare *Mackay* v. *Dillon*, 4 How. 421, 447; *Dower* v. *Richards*, 151 U. S. 658, 667; *Cleveland, &c. Ry.* v. *Backus*, 154 U. S. 439, 443; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655, 668; *Bailey* v. *Alabama*, 219 U. S. 219, 239; *Central Vermont Ry.* v. *White*, 238 U. S. 507, 512; *Hill* v. *Smith*, 260 U. S. 592, 594.

A recent exposition of the doctrine is found in *Norris* v. *Alabama,* 294 U. S. 587, a case coming here from a state court, in which the appellant claimed that he had been denied due process by the systematic and intentional exclusion of negroes from the jury lists. The state court held that the evidence did not establish such exclusion. This court reviewed the evidence, reached a conclusion contrary to that of the state court, and reversed the judgment. At pp. 589-590 it was said:

"The question is of the application of this established principle to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

In *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1, the validity of a state inheritance tax act was challenged in a state court, the claim being that the act operated to take property without due process if held to apply to property having no situs in the state. The state court held that intangible property, the transfer of which was sought to be taxed, had acquired a business situs in South Carolina. This court re-examined the question, in the light of the evidence, and overruled the state court's decision, saying (p. 8):

"But a conclusion that debts have thus acquired a business situs must have evidence to support it, and it is our province to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution."

In *Johnson Oil Company* v. *Oklahoma,* 290 U. S. 158, there was drawn in question the validity of *ad valorem* taxes laid under a state statute upon the entire fleet of the appellant's tank cars. It was charged that the cars did not have a situs within the state and there was, therefore, no jurisdiction to tax them. The Supreme

Court of the state held that all the cars had their taxable situs within the state. This court examined the evidence, reached a contrary conclusion, and reversed the judgment, saying (pp. 159-160):

"As the asserted federal right turns upon the determination of the question of situs, it is our province to analyze the facts in order to apply the law, and thus to ascertain whether the conclusion of the state court has adequate support in the evidence."

Citation of authority for the same principle might be multiplied indefinitely.[15]

While holding the testimony of the department auditor competent, the state court omits to refer to the fact that the figures he presented were not allocated so as to show the amounts spent for inspection and regulation and those expended for other so-called railroad charges which could not be imposed upon the railroads. As has been pointed out, the evidence is uncontradicted and conclusive that the sums he mentioned as having been expended for railroad account did include substantial, and apparently large, amounts for activities in the interest of interstate shippers and for the trial of reparation cases. It is impossible to sustain the state court's conclusion that such testimony had any probative value upon the sole issue in the cause, which was whether the statute subjects the railroads to an unreasonably excessive charge for inspection and regulation. As was said in the *Foote* case, the state is at liberty to intermingle duties involving costs properly chargeable to the railroads, with others involving costs not so chargeable, but if it does so, and the exaction is challenged, it must assume the burden of showing that the sums exacted from the appellant do not exceed what is reasonably needed for the service rendered. The State failed to carry this burden.

It results that the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

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[15] *Kansas City Southern Ry.* v. *Albers Comm. Co.*, 223 U. S. 573, 591; *Creswill* v. *Grand Lodge*, 225 U. S. 246, 261; *Northern Pacific Railway* v. *North Dakota*, 236 U. S. 585, 593; *Interstate Amusement Company* v. *Albert*, 239 U. S. 560, 566; *Truax* v. *Corrigan*, 257 U. S. 312, 324; *Ward & Gow* v. *Krinsky*, 259 U. S. 503, 511; *Aetna Life Insurance Company* v. *Dunken*, 266 U. S. 389, 394; *Fiske* v. *Kansas*, 274 U. S. 380, 385; *Ancient Order* v. *Michaux*, 279 U. S. 737, 745; *Consol. Textile Co.* v. *Gregory*, 289 U. S. 85, 86.

SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1936.

Great Northern Railway Company, Appellant, *vs.* State of Washington. } Appeal from the Supreme Court of the State of Washington.

[February 1, 1937.]

Mr. Justice Cardozo, dissenting.

To show that the revolving fund was used as a common pot for the regulation of public utilities generally, irrespective of their special function, does not make out a case of wrong to railroads considered as a separate class or to appellant in particular. For the purposes of this case there is no need to inquire whether anything in the Fourteenth Amendment forbids the recognition of a single and all-inclusive class of public service corporations without further subdivision. If the prohibition be assumed, still the burden is on the railroads to satisfy the court that what was contributed by them was more than what was expended for their account, since otherwise the common pot may have been a help and not a hurt. That burden was not discharged. Far from being discharged, there was a disclaimer of any attempt or purpose to discharge it. And so the case must fail. *Norfolk & Western Ry. Co.* v. *North Carolina*, 297 U. S. 682, 688, 689, 690.

The decision in *Foote* v. *Stanley*, 232 U. S. 494, much relied on by appellant, is inapplicable here. That was a case under Article I, section 10, of the Constitution, which provides that "no State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws." Maryland passed an act for the payment of charges, characterized as inspection fees, upon imports of oysters from neighboring states. The "inspectors" did more than inspect the oysters; they policed the waters of Chesapeake Bay, being thus policemen as well as inspectors. On its face the act provided that a fee of one cent per bushel should be

"levied to help pay the salary of the inspectors and the other expenses of the State Fishery Force." 232 U. S. at 505. In these circumstances the ruling was that in a suit for an injunction brought by the importers the state had the burden of showing that the fee was not an unreasonable one for the service of inspection as distinguished from the other services covered thereby. Imposts upon interstate commerce being generally prohibited, and being lawful only when "absolutely necessary" for the purpose of inspection, a charge covering the service of inspection and also some thing else must collapse in its entirety unless the state is in a position to break it up into its elements. A power has been granted to be used in exceptional conditions. The state must bring itself within the exception if it seeks to act within the grant.

A very different situation confronts us in the case at hand. Here the statute of the state does not trespass upon a field of legislation where entry is forbidden without the license of the nation. What has been done is well within the field of general legislative power, with every presumption of validity back of it. In such circumstances the burden of making good a claim of invalidity and thus establishing an exception is on the assailants of the rule, and not on its proponents. The conclusion becomes clearer when the statute is analyzed more closely. All that it does is to exact of public utilities generally (with particular exceptions) a fee of 1/10th of one per cent of their gross revenues, confined, however, to operations in intrastate commerce, the fee when collected to be paid into a revolving fund. Laws of Washington, 1929, c. 107; Laws of 1923, c. 107; Laws of 1921, c. 113. Another statute (Laws of Washington, 1929, c. 108) lays a heavier tax (1%), to be paid into the same fund, upon the receipts of auto-transportation companies. Steamship companies of a stated class are subject to a special rule, the fee in their case being 1/5th of one per cent. Laws of Washington, 1927, c. 248. Plainly there is no presumption that these varying contributions are out of proportion to the expenses incurred in supervising and regulating the several classes of contributors. Illegality, if there is any, is to be found in the administration of the statute, and not in anything inherent in its essential scheme and framework. That being so, the taxpayer may not rest upon a showing of possible overpayment. There must be a showing of an overpayment not merely possible but actual, and one sub-

stantial in amount. *Norfolk & Western Ry. Co.* v. *North Carolina, supra; Foote* v. *Stanley, supra.* To hold otherwise would be to go counter to the settled rule that "one who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him." *Premier-Pabst Sales Co.*, v. *Grosscup,* 298 U. S. 226, 227. Analogies drawn from the law of trusts are inapposite and misleading. The state does not collect the taxes or place them in the fund as trustee for the contributor or for any one else. It receives the moneys and expends them as an owner, charged with no other duty to a particular group of taxpayers than to members of the public generally.

The burden resting on the railroads to show that the use of the common pot has resulted to their damage, the record must be scrutinized to see whether the burden has been borne. In that scrutiny there is no denial of a duty to inquire whether the decision of the state court, irrespective of its surface protestations, amounts in substance and reality to the denial of a federal right. *Norris* v. *Alabama,* 294 U. S. 587, 589; *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1, 8. There is a recognition of the duty, and an endeavor to fulfill it.

1. The trial court suggested to counsel for appellant that it would be interesting to know whether the amount that had been collected through the tax upon the railroads was in excess of the amount expended for their benefit? Counsel responded that he would not embark on that inquiry. His position was stated to be that the act was invalid on its face, in which event it would be vain to pursue the subject further. This court by its opinion has rejected that contention. The act is not invalid on its face, whether valid or invalid otherwise.

2. Explaining or at least supplementing the refusal to compare disbursements and receipts, counsel stated on the trial that there were no records available. But the contrary was clearly proved. The auditor of the Department of Public Works caused the employees of the Department to submit vouchers or slips descriptive of their services with an appropriate segregation and apportionment among the several classes of utilities. He testified on the basis of these reports, which were on file in his office, that disbursements for account of the railroads were in excess by $37,833.14 of the railroads' contributions. Counsel for appellant ex-

presses his belief that inspection and discovery of the contents of the vouchers would have yielded inadequate information. His business was to look and see.

3. The objection will not hold that the documents might be ignored for the reason that, if produced, they would be incompetent as evidence. Apart from the possibility of examining the men who made them, it is the law of the state of Washington, declared in this very case, that the slips and vouchers so filed in the course of the business of the bureau were sufficient to support the testimony of the auditor as to the conclusions to be drawn from them. Referring to that subject, the court said: "While the account kept by the auditor was not official, in the sense that of itself it was admissible in evidence, yet what the auditor did in that respect qualified him to testify as to the ultimate fact. Without further detailing the evidence, we will say that in our opinion, and in so far as there was any evidence on the subject, it preponderated against the findings made by the [trial] court as to the cost of supervising and regulating railroads."

Whether the evidence thus accepted and relied upon would be rejected by other courts either as hearsay or on other grounds is quite beside the point. The Fourteenth Amendment does not confine the states to the common law rules of evidence, however well established. *West* v. *Louisiana*, 194 U. S. 258, 262, 263; *Brown* v. *New Jersey*, 175 U. S. 172, 174, 175; *Twining* v. *New Jersey*, 211 U. S. 78, 101; *Luria* v. *United States*, 231 U. S. 9, 25. "The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law." *Brown* v. *New Jersey*, *supra*. The acceptance of the testimony of the auditor does not touch the privilege of confrontation in a prosecution for a crime. *Snyder* v. *Massachusetts*, 291 U. S. 97, 106. It does not substitute hearsay for direct testimony generally or as to every possible issue arising in a case. At most it is an enlargement of the common law rule as to entries in books of account or in public or official documents. Cf. *Wigmore, Evidence*, vol. 3, § 1517 *et seq*; § 1630 *et seq*.

Hearsay is competent evidence by the law of many enlightened countries. *Stumberg, Guide to the Law and Legal Literature of* France, pp. 148, 149; *Encyclopedia of the Social Sciences*, Title, "Evidence"; vol v., pp. 646, 647. Even at common law it is com-

petent at certain times and for certain purposes, though narrowly restricted. *Wigmore, Evidence,* vol. 3, § 1420 *et seq.; Thayer, A Preliminary Treatise on Evidence at the Common Law,* p. 518. The range of its competence has been greatly enlarged by statutes in many of the states, as, e.g., in the administration of Workmen's Compensation Laws, and by the relaxation of ancient rules as to entries in accounts. *Dodd, Administration of Workmen's Compensation,* pp. 227-236; *Wigmore, Evidence,* Supplement, 1934, §§ 1519, 1520; *Morgan* and others, *The Law of Evidence,* p. 51; New York Civil Practice Act, § 374 a; cf. *Massachusetts Bonding & Insurance Co.* v. *Norwich P. Co.,* 18 F. (2d) 934; *Cub Fork Coal Co.* v. *Fairmont Glass Co.,* 19 F. (2d) 273; *United States* v. *Cotter,* 60 F. (2d) 689. The question may be laid aside whether a change in the law of evidence might be so radical and unjust as to work a destruction of fundamental rights and thus a denial of due process. *Brown* v. *New Jersey, supra,* p. 175. Assuming such a possibility, there is nothing in this ruling to make it a reality. If the legislature of Washington had passed a statute to the effect that vouchers in a public office, filed by the employees at the bidding of a superior, should be *prima facie* evidence of the truth of their contents, it is not open to doubt that such a statute would be valid. It would not even involve an extreme departure from common law analogies rooted in the presumption of official regularity. What a state may do in changing the rules of evidence through the action of its legislature, it may do with equal competence through the action of its judges, for anything to the contrary in the Constitution of the United States.

4. Appellant did not discharge its burden by proving in a vague way that some of the disbursements classified by the auditor as a charge against the railroads were incidental to proceedings conducted before the Interstate Commerce Commission or elsewhere for the benefit of private shippers and were not properly a part of the expense of local regulation.

The Attorney General takes the ground that disbursements from the revolving fund, if made for that purpose, were without authority of law. If that be so, they cannot avail to invalidate the statute, though they may lay the basis for a remedy in behalf of the state or others against the officers or agents guilty of unintentional misfeasance. Aside, however, from that objection, there was no at-

tempt by appellant to prove the amount of these or like withdrawals in even the roughest fashion. There was no suggestion, much less evidence, that they would wipe out the excess of $37,833.14 stated by the auditor. An inquiry directed to the point would have yielded in all likelihood an estimate at least approximately correct. If such inquiry was inadequate, the slips and vouchers were available for scrutiny and dissection. Examination of the auditor in connection with the documents would have shown forth the truth.

The presumption of validity which sustains an act of legislation is unbroken by the evidence.

The CHIEF JUSTICE, Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.